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Luciene Dal Ri
Natammy Bonissoni
Orlando Luiz Zanon Junior
(organizers)

PERSPECTIVES OF LAW IN THE 21ST CENTURY: CONSTITUTIONALISM, TRANSNATIONALITY AND THEORY OF LAW

CAPES
Programa de Excelência Acadêmica - PROEX

2020

UNIVERSITÀ DEGLI STUDI DI PERUGIA

Widener University 1821
Delaware Law School

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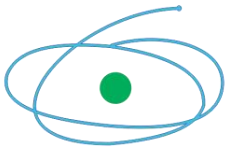

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Organizers
Dra. Luciene Dal Ri
Dra. Natammy Luana de Aguiar Bonissoni
Dr. Orlando Luiz Zanon Junior

Introduction
Dra. Luciene Dal Ri
Dra. Natammy Luana de Aguiar Bonissoni
Dr. Orlando Luiz Zanon Junior

Authors
Airto Chaves Junior
Alexandre Morais da Rosa
Aline Beltrame de Moura
Bruno Makowiecky Salles
Caroline Bündchen Felisbino Teixeira
Daniel Raupp
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Orlando Luiz Zanon Junior
Osvaldo Agripino de Castro Junior
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Ronaldo David Viana Barbosa
Thiago Aguiar de Pádua

Diagramming
Alexandre Zarske de Mello
Matheus José Vequi

Cover
Alexandre Zarske de Mello

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SUMMARY

INTRODUCTION 5
Luciene Dal Ri 5
Natammy Luana de Aguiar Bonissoni 5
Orlando Luiz Zanon Junior 5

A BRIEF INTRODUCTION TO THE BRAZILIAN SECULAR STATE 8
Natammy Luana de Aguiar Bonissoni 8

DARK LIGHTING: THE PROBLEM OF ARTICLE 142 INTERPRETATION AT THE BRAZILIAN 1988 CONSTITUTION'S HEART 17
Thiago Aguiar de Pádua 17
Airto Chaves Junior 17

THE POSSIBLE UNCONSTITUTIONALITY OF THE PANOPTIC CONTROL OF THE OFFICE OF THE COMPTROLLER GENERAL (CGU) OVER BRAZILIAN FEDERAL UNIVERSITIES. 38
Marcos Leite Garcia 38
Luiz Henrique Urquhart Cademartori 38
Ronaldo David Viana Barbosa 38

CONSTITUTIONAL BASES OF BRAZIL'S SHIPPING AND PORT REGULATIONS 52
Osvaldo Agripino de Castro Junior 52

REGULATION AND REASONABLE PRICES IN BRAZILIAN´S SHIPPING AND PORT SECTORS 69
Osvaldo Agripino de Castro Junior 69

ACCESS TO JUSTICE: LEGAL CONCEPT AND CHARACTERIZATION 87
Bruno Makowiecky Salles 87
Paulo Márcio Cruz 87

NEO-KEYNESIANISM, NEO-INTERVENTIONISM AND ULTRALIBERALISM: IMPACTS OF COVID-19 ON NATIONAL LAW 100
Paulo Márcio Cruz 100
Márcio Ricardo Staffen 100

AGREEMENT ON RESIDENCE FOR NATIONALS OF THE STATES PARTIES OF MERCOSUR: INNOVATION IN IMMIGRANTS RIGHTS IN BRAZIL?[*] 115
Luciene Dal Ri 115
Aline Beltrame de Moura 115

JUDICIAL INTEGRITY AT THE TRANSNATIONAL REALM: THE LEGITIMACY OF THE UNITED NATIONS PRINCIPLES OF JUDICIAL CONDUCT IN TIMES OF IDEOLOGICAL CONFLICTS OVER GLOBALIZATION, GLOBALISM, ANTI-GLOBALIZATION, AND NATIONALISM 136
Gilson Jacobsen 136
Caroline Bündchen Felisbino Teixeira 136
Miguel Angelo Zanini Ortale 136

LEGAL EDUCATION AND CIVIL PROCEDURAL PRACTICE IN BRAZIL AND IN THE UNITED STATES 146
Gilson Jacobsen 146
Daniel Raupp 146
Caroline Bündchen Felisbino Teixeira 146

SCIENTIFIC APPROACH TO LAW 160
Orlando Luiz Zanon Junior 160
THE COGNITIVE PROBLEM OF THE BEHAVIORAL DECISION THEORY THROUGH GAME THEORY: BIASES AND HEURISTICS 175
Alexandre Morais da Rosa 175

INTRODUCTION

Luciene Dal Ri
Natammy Luana de Aguiar Bonissoni
Orlando Luiz Zanon Junior

This volume presents a collection of contributions prepared by professors at Master and Doctoral Program in Legal Science of University of Vale do Itajaí, supported by PROEX (Capes Excellence Academic Program). The contributions collected reflect the Program's research activities, focused on the Fundamentals of Positive Law, specifically in the research lines Constitutionalism and Law Production, and, Law and Jurisdiction. The research activities of the Program in this volume are inserted and in dialogue with the professor's research at universities from Europe and America, as Perugia (Italy) and Delaware (USA). This volume is divided into three parts, concerning brazilian constitutionalism and it's permeability by transnationality and law theory on the 21st century.

The first part of the book cares about specific aspects of the brazilian constitution in themes of secular state, university autonomy and the brazilian army constitutional role.

It opens with the dialogue between constitution and social organization. The chapter "Brief considerations of the Brazilian secular state", of Professor Natammy Bonissoni, concerns interfaces between law and religion in Brazil, considering constitutional foundations, axiological and cultural values, and, especially, the spiritual aspect of the human being. In this perspective, Bonissoni aims to demonstrate that the brazilian model of secularity does not mean the absence of religiosity in the public sphere, but the guarantee and safeguard of all its expressions.

Still on the constitutional law, on their contribution, Professor Marcos Leite Garcia and Luiz Henrique Cademartori reflect on the use of the brazilian constitution's panoptical model to control federal institutions of higher education. The professors indicate that the control exercised by federal general controllership (CGU) over the administrative acts of federal institutions of higher education is similar to the panoptical model observed by Jeremy Bentham and how it implies a decrease in university autonomy.

Separation of powers and democratic culture is the essential subject of Pádua and Professor Chaves Júnior's chapter, concerning the debated rule of the brazilian army as "moderate power" in nowadays constitution. The chapter deals with the constitution and brazilian historical context to conclude that there is no place for an interpretation of the brazilian army as a "neutral" or "moderate" power.

The second part of the book concerns on constitution and transnationality, approaching themes that permeate international law and affects fields of domestic law.

Respecting this approach, Agripino's chapter ("Regulation and Reasonable Prices in brazilian's shipping and port ´sectors") analyzes the constitutional bases of Brazil's shipping and

port regulations, given the lack of the proper service (predictability, modicity, punctuality, and efficiency) for the shipper. The author points out that constitutional foundations of regulation increase the adequate service's effectiveness, specially based on article 174 of the federal constitution.

In his second contribution, Professor Agripino points out the economic order of the brazilian federal constitution and the obligation of public power to maintain the appropriate service of the shipper. The lack of appropriate regulation in the prices and tariffs of the sector of waterway transportation and ports by the national agency for waterways and ports implied, however, in the nonexistence of appropriate service. The regulations applied through some case's studies indicate that the sectorial agency should take the leadership to proportionate reasonable prices to provide an appropriate service to the shippers, including the use of price cap (limitations to the price).

What should be understood, contemporaneously, by Access to Justice, is presented by Prof. Paulo Márcio Cruz and Bruno Makowiecky Salles. They address the challenge of deal with this issue by describing the main elements that portray the stage of development of the theme in Legal Science. With no pretension to exhaust the subject, the authors consider its scope and complexity, and seek to situate Access to Justice in the contemporary scene and present the approaches commonly attributed to it, providing the methodological and terminological clarifications necessary for a proper understanding.

Transnational law and pandemic are the contribution subjects of Professors Cruz and Staffen. They analyze national law changes of several countries, resulting from the COVID-19 pandemic, within the theoretical frameworks of neo-keynesianism, neo-interventionism and ultra-liberalism. The authors point out the challenges to present legal responses to the political, economic, social, and institutional problems created by this pandemic, changing political agendas of each government, the roles of states and national laws.

The insertion of international law in the domestic system is analyzed by Professors Luciene Dal Ri and Aline Beltrame de Moura in Brazil's reception of the Agreement on Residence for Nationals of the States Parties of Mercosur (2002). The reception of the agreement by Brazil created the expectation, on a national level, of expanding rights and greater humanization of mercosurian immigrant's treatment. Dal Ri and Moura confront the brazilian legal system's rights and the Mercosur Residence Agreement to verify possible innovations concerning immigrant's rights. They show that Brazil historically has great recognition in this matter. At the same time, they denote little innovation provided by the Mercosur Residence Agreement and the intensification that it provides to create different immigrant categories, based on their country of origin.

The third and last part of the book concerns legal education and law theory pointing out challenges between the scientific approach and the professional practice.

In this context, Professor Gilson Jacobsen and students Daniel Raupp and Caroline Bündchen Felisbino Teixeira proposes the chapter "Legal education and civil procedural practice in Brazil and the United States". They explain the different forms of legal education in these countries, the dialogue between legal theory and pratice in the stages of civil action in both jurisdictions and the judge's role in each of the procedural stages, especially those related to the production of evidence. Authors develop a comparison between the method of legal education carried out in both countries, comparing some stages of the civil process adopted in these countries, aiming to relate the form of performance of the legal professional with the training received in law school.

In “Scientific approach to law”, Professor Orlando Zanon purposes arguments to justify the importance of adopting a scientific approach to study of law. The research concerns the divergences regarding the possibility of producing qualified knowledge of law. It’s based mainly on the argument that law is a field marked by the connection of value and moral discussions, affecting policy in a broad sense and, therefore, unsusceptible to confirmation through an empirical experiment, especially in the absence of a specific methodology. For the theme's treatment, Zanon established a semantic agreement regarding law and science concepts, and arguments were presented to justify scientific legal theories. As an alternative, arguments were also collected to, at least, justify the effort to adopt a scientific approach towards law, in order to escape the exclusive use of metaphysical argumentation.

Ending the volume, Professor Alexandre Morais da Rosa discusses "the cognitive problem of the behavioral decision theory through game theory”. Rosa examines an alternative approach to the analysis of decision-making under the lens of the game theory, aiming to demonstrate through the inductive method that this bias can provide the necessary instruments for a better understanding of judicial decisions. It deals with the problem of decision theory regarding the lack of explanation about how decisions are produced to stimulate the dialogue and the application of multidisciplinary content, reflecting the theoretical-practical concern in indicating the correct form of procedural rationality. Faced with a literature review, Rosa highlights the evidence that game theory's introduction to the process can improve the procedural reading in an uncertain environment. In this context, the understanding of heuristics and biases through game theory makes it possible to realistically establish the structure of human interactions mediated by the process.

Through the book's chapters, UNIVALI professors provide different perspectives to instigate and contribute to brazilian and international scientific comunity in the approach of law, hoping to help to build better time to people and academic research.

Itajaí, November 10, 2020.

A BRIEF INTRODUCTION TO THE BRAZILIAN SECULAR STATE [1]

Natammy Luana de Aguiar Bonissoni[2]

INTRODUCTION

By analyzing the development of the ancient civilizations, the formation of the Hebrew theocracy, the divine character granted to the Roman emperors and the construction of the concept of civil religion in the modern state, it can be seen that the (at least political) rupture caused by the French Revolution between the State and religion represented a new fact in the history of civilizations.

It is possible to see that there are several models of secularism, each of which takes into account the cultural, religious, political and legal context of each state and, therefore, each form of relationship between the state and the religious phenomenon needs to be analyzed considering a historical background both legal and political.

In this sense, the present study aims to briefly identify the model of the secular state adopted by Brazil in an attempt to undo certain doubts, so that an adequate interpretation of constitutional devices demystifies fallacies and dispel certain misunderstandings.

1. RELIGION AND LIFE IN SOCIETY

Eric Voegelin[3], when analyzed the model of order that organized the great societies, initially the Near Eastern civilizations, found that they all understood themselves as mirrors of a cosmic order . Unlike today, the empires of the past did not transcend their own realm, as they perceived themselves as a reflection of the cosmos. Thus, as divinity ordained the cosmos, the King similarly ordained society.

Jewish tradition broke with this kind of civilization. In Israel, for the first time in history, man comes into contact with a being, God (a supra-cosmic entity) which until then was unthinkable for cosmological civilization[4]. Voegelin then realizes that it is only now, after the human being comes into contact with a supra-cosmic being, that the story begins. The understanding that there is a being, above the social order itself, that instituted, ordained and established norms for all spheres, led to the proposition of objective and absolute norms to be respected in all time and space.

The understanding of the German historian is similarly shared by Flávius Josephus, Leo Strauss, Jacques Maritain, Rousas J. Rushdoony, Alvin J. Schmidt and Jónatas E. Machado, who, in addition to corroborating this understanding, substantiate the relevance of the analysis of the

[1] Some parts of this article has already been published in the article Brief Considerations About the Brazilian Secular State.
[2] Professor at Master's and Doctoral Program in Legal Science at UNIVALI, Brazil. Email address: natammy@hotmail.com.
[3] VOEGELIN, Eric. **Ordem e história:** Israel e a revelação. São Paulo: Edições Loyola.
[4] VOEGELIN, Eric. **Ordem e história:** Israel e a revelação. São Paulo: Edições Loyola.

religious phenomenon, especially the Judeo-Christian tradition, as the guiding line connecting the Religious Freedom and the Secular State itself.

Julie Riens, founder of fundamental religious anthropology as a new field of knowledge, defends the understanding that the human being, since its origin, is a religious man.[5] From the earliest times, through the influence of Greek thought and the contributions of Roman law, it was found that from the rationalism and the intense process of secularization suffered by the West, the metaphysical and religious universes were set aside and scientism emerged as a sure conductor to the truth.

The realization that man has the right to exercise and manifest his religiosity has spanned centuries, developing organically and influencing the development of other fundamental freedoms. Thomas Jefferson understood the right of man to manifest his religiosity as the most sacred and inalienable right of all human rights.[6]

After nearly two hundred years, the protection of freedom of religion in the Universal Declaration of Human Rights has revealed a high degree of global - albeit unanimous - consensus on its importance “for the preservation of the dignity of the human person and for coexistence between the peoples"[7]. However, despite all the historical development and recognition in political and international documents on the subject, Malcom Evans8 considered freedom of religion or belief as a “forgotten process,” a human right that, compared to others, has not been well-regarded successfully.

It is important to highlight that international instruments of protection that safeguard the right to freedom of religion do not define the meaning of the term religion, which demonstrates the challenges in verifying what exactly can be framed as religion or belief. For the European Council, for example, the failure to provide a clear definition of the term is purposeful, and that shortcoming is right in the need for the conceptualization of the term to be comprehensive enough to embrace the full range of religions in Europe while being specific enough to apply to individual cases.[9]

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[5] RIES, Julien. The man has been religious since the time of the australopitech Lucy. **Unisinos Humanitas Institute.** Interview given to Andrea Tornielli, published on the Vatican Insider website and translated by Moses Sbardelotto. Available at: http://www.ihu.unisinos.br/noticias/505568-o-man-e-religioso-desde-o-tempo-do-australopiteco-lucy-entrevista-com-julien-ries. Access on Mar 30, 2019.

[6] JEFFERSON, Thomas. **Thomas Jefferson on Politics & Government**. Available at: https://famguardian.org/subjects/politics/thomasjefferson/jeff1650.htm. Access on Nov. 2020.

[7] DOS SANTOS JUNIOR, Aloisio Cristovam. **Liberdade Religiosa e Contrato de Trabalho.** Niterói: Impetus, 2013. P. 90.

[8] EVANS, Malcolm. Advancing Freedom of Religion or Belief: Agendas for Change. **Forum 18 News Service**. Available at: http://www.refworld.org/docid/4df7312a2.html Accessed on Nov 2020.

[9] ECRH. European Court of Human Rights. Council of Europe. **Guide to article 9 -Freedom of thought, conscience and religion.** Available at: https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf

It is evident, therefore, that religious freedom can imply having a religion, not having a religion, changing religion, sharing one's religion, practicing the inherent rites of religion, and instructing children according to the precepts of their religion.[10]

According to the Commentary on the American Convention on Human Rights[11], religious liberty "is free to profess in the name of a religion, understood as the relationship of the man to the divine (not necessarily to a personal person, but to the divine) which is a relation to the transcendence) of which some ethical beliefs, opinions, beliefs, and religious observances come from the outside which are positively externalized through the free individual or collective manifestation, public or private, through various particular specifications. The protected good of that freedom is not precisely religion but human freedom exercised in the religious sense, which deserves protection and promotion for its full enjoyment and exercise.

However, despite all the historical development and recognition in political and international documents on the subject, Malcom Evans[12] considered freedom of religion or creed as a "forgotten process", a human right that, compared to others, has not been very successful. It is relevant to note at this point that the international instruments of protection that safeguard the right to freedom of religion do not define the meaning of the term Religion, which demonstrates the challenges in verifying what exactly can be framed as religion or creed. Paschoal[13] recognizes such an effort as a "non-transposable difficulty".

Thus, supported by the Universal Declaration of Human Rights and the American Convention on Human Rights, as well as by several international treaties, it is clear that the right to freedom of religion in Brazil is not disseminated and protected in the same way as in other states and international organizations, which may justify many misunderstandings and even a certain confusion as to its implications in relation to the principle of secularity and the secular state.

2. WHAT THE PRINCIPLE OF SECULARITY IS NOT

The religious phenomenon has always had an important political and legal-political projection, having influenced not only the cultural history, but also the political narrative. It is noticeable that no Constitution fails to consider it, and its repercussions in international law are notorious. However, religious phenomena come in different forms, according to times and places and, depending on the types of state and political regimes, the content of relations between public power and religious confessions vary[14].

[10] PASCHOAL, Janaína Conceição. **Religião e Direito Penal:** interfaces sobre temas aparentemente distantes. Sao Paulo: LiberArs, 2017. P-69

[11] STEINER, Christian; URIBE, Patricia. **Convención Americana sobre Derechos Humanos** – Comentario. Bolívia: Plural Editores, 2014. Available at: https://www.kas.de/c/document_library/get_file?uuid=03728c83-4b96-d946-e66a-9b52b6adcbb7&groupId=252038. Accessed on Nov 2020.

[12] EVANS, Malcolm. Advancing Freedom of Religion or Belief: Agendas for Change. **Forum 18 News Service**. Available at: http://www.refworld.org/docid/4df7312a2.html Accessed on Nov 2020.

[13] PASCHOAL, Janaína. C. **Religião e Direito Penal:** interfaces sobre temas aparentemente distantes. São Paulo: LiberArs. p. 38.

[14] MIRANDA, Jorge. **Estado, Liberdade Religiosa e Laicidade**. Observatório da Jurisdição Constitucional, 7(1), 1-22.

French social scientists such as Pierre Bréchon, Gustave Peiser and Jean-Paul Willaime have drawn a distinction between secularity of aggressive combat (laïcité du combat), whose purpose is to combat the influence of religion and priests, and secular cohabitation, or secularity of tolerance and flexibility (laïcité ouverte), which allows greater space for the religious in the public sphere. César Ranquetat Junior reflects Bréchon's position on aggressive secularism, which argues that the model seeks to "[...] exterminate religion, make it disappear from social life and eradicate it from individual consciences."[15]

For the Spanish sociologist Millán Arroyo Menéndez[16] , secularism, as the French model of secularism is also understood, can be characterized as "anti-religious belligerent, the least anti-clerical, and eventually developing a vision of the alternative world, which came into direct competition with the religious view of the world. Its greatest historical expression was the communist ideology, which impacted on all the territories from which communism was impelled as a political form. "

A good example that demonstrates the performance of the French model is the data shared by the Pew Research Center, which identified France as the only European Union member state to hold more than 200 cases of government actions against religious groups - mostly cases of individuals being punished for violating the ban on facial coverage in public spaces and government buildings in France.

It is interesting to note that this aggressive secularism (laïcité du combat) was experienced by Brazilians during the 1937 Constitution, where it was possible to perceive serious restrictions on religious freedom, including the loss of political rights in case of lack of conscience.[17]

In this way, laicism aims to remove religious belief from any and all public spaces, including schools, reneging it only to one's private space. The model adopted by the French government, expressed clearly and evidently by the French Secularism Charter (Charte de la laïcité), posted in French schools in September 2013. The obligation to establish the Charter in public schools throughout France has led to numerous challenges, including from the Europe Ecologie-Les Verts group, which considered the content of the Charter a "deliberate choice by the Executive to systematically expel the subject of religious freedom".[18] This is because the student can use in the classroom his/her philosophical, scientific or any other convictions, as long as it is not religious; as if the expulsion of religion from the school system would enable an environment of neutrality.

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[15] RANQUETAT JR; Caesar. Laicidade, Laicismo e Secularização: definindo e esclarecendo conceitos. **Revista Sociais e Humanas.** V. 21. N 1 2008. Available at: https://periodicos.ufsm.br/sociaisehumanas/article/view/773. Accessed on: Accessed on Nov 2020.

[16] ARROYO, Millan. **La fuerza de la religión y la secularización en Europa**. Available at: https://eprints.ucm.es/5864/1/224-32-ANALISIS.pdf. Accessed on: Accessed on Nov 2020.

[17] VIEIRA, Thiago Rafael; REGINA, Jean Marques. **Direito Religioso:** questões práticas e teóricas. Porto Alegre: Concórdia, 2018. P. 107.

[18] CHAMBRAUD, Cécile. L'Observatoire de la laïcité critique la charte de la laïcité de la région Ile-de-France. **Le Monde.** Retrieved on Nov 2020 from https://www.lemonde.fr/societe/article/2017/03/28/l-observatoire-de-la-laicite-critique-la-charte-de-la-laicite-de-la-region-ile-de-france_5101947_3224.html

Although the French model is aggressive and even considered by many to violate the universal right to exercise the right to freedom of religion, it can be seen that there is a clear difference between the secularism operated in France, for example, and the active secularism in Brazil, which is clearly not secularist, that is, anti-religious and contrary to the religious faith.

3. THE BRAZILIAN SECULAR STATE

With the advancement of societies and the development of States, different models of interaction between the state and religion emerged as consequences of an already existing relationship of the social body with the religious phenomenon. Depending on the times and places, the types of State, the political regimes, as well as the dominant ideologies, the content of the relations between the public power and the religious confessions influenced the formation and establishment of the state model of relationship with the religious phenomenon.

During the imperial period, the Brazilian State adopted in the 1824 Constitution the model of Confessional State, at which time it declared the Roman Apostolic Catholic religion as its official religion. At that time, other religions were allowed to exist, as long as they acted domestically and without the exterior form of a temple, which, in practice, denied the majority of religions the clandestinity.[19]

In 1891 Brazil became secular with the implementation of the republican mode of government. Ruy Barbosa, charged with drafting the new constitutional text, has made the Brazilian state secular by promoting equality among all religions, including decree 119-A / 1890[20], which is in force until today and that it prohibits state intervention or embarrassment over any church or religion.[21]

Thiago Rafael Vieira and Jean Marques Regina[22] affirm that Decree 119-A / 1890 clarifies any doubts about the model of secularism adopted by the Brazilian Republic: a neutral secularity, guaranteeing the spiritual order, expressed through the religious phenomenon manifested by through each person's faith and the value set they believe in, often wrapped up in the form of a religious organization.

Religious freedom, currently guaranteed by the Federal Constitution, is only possible due to the neutrality presented in art. 19, I, regulated by Decree 119-A / 1890. In this context, it is possible to clarify the model of secularism in Brazil from four constitutional prohibitions by the

[19] VIEIRA, Thiago Rafael. **O Estado Laico Brasileiro.** VR Advogados. Available at: https://www.vradvogados.adv.br/tag/estado-laico/ Access on Nov. 2020.

[20] BRASIL. **Decreto 119-A / 1890.** Available at: http://www.planalto.gov.br/ccivil_03/decreto/1851-1899/D119-A.htm. Access on Nov 2020.

[21] VIEIRA, Thiago Rafael; REGINA, Jean Marques. **Direito Religioso:** questões práticas e teóricas. Porto Alegre: Concórdia, 2018. P. 122.

[22] VIEIRA, Thiago Rafael; REGINA, Jean Marques. **Direito Religioso:** questões práticas e teóricas. Porto Alegre: Concórdia, 2018. P. 123.

state: a) the establishment of religious cults or churches; b) the subsidy of certain religious cults or churches; c) embarrassment to the operation of religious cults or churches; and d) maintaining relations of dependence or alliance with religious cults, churches or their representatives.[23]

By exclusion, it can be seen that the Brazilian state is not theocratic in view of the prohibition of the establishment of religious cults or churches; neither is it confessional, judging from the impossibility of subsidizing or maintaining religious services or churches, or maintaining a relationship of dependence or alliance with them. Moreover, the Brazilian State is not an atheist or a combatant secularist since it is forbidden to hinder the functioning of religious cults or churches.[24]

In this way, the Constitution protects religious freedom with the aim of making it easier for people to enjoy their faiths.[25] as well as exercise them without any embarrassment or impediment, besides having them as the basis of their actions, decisions and conducts. It is important to point out that, although admittedly considered a matter of intimate forum, the exercise of religiosity is beyond the figure of the individual, not being considered an accessory part of human life, but the elementary center of their choices and orientation, whether they are religious or from the denial of religiosity.

Contemporary documents protecting individual human rights ensure such insight and contribute to national recognition of the rights to freedom of conscience and religion. Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and the European Convention on Human Rights consider as absolute and unconditional the right to have a belief or to change it at one's own discretion, preventing state interference in any option.

It is important to emphasize that although the Law cannot be an instrument to regulate or even control the individual's relationship with God, the exercise of religiosity can be accompanied by the State for the common good of the community. Although the purpose of this brief chapter is not to go into detail about the many consequences of exercising freedom of religion, it is important to note that certain limitations may be justified in the pursuit of the common good of the State, both spiritual and temporal, as well as in the principle of the dignity of the human person. The succinct argument can find support by bringing to the debate the discussion of female genital mutilation and child marriage, defended as legitimate on the basis of religious assumptions and that subjugate countless women of different beliefs, local cultures to acts contrary to their will.

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[23] VIEIRA, Thiago Rafael; REGINA, Jean Marques. **Direito Religioso:** questões práticas e teóricas. Porto Alegre: Concórdia, 2018. P. 130.

[24] VIEIRA, Thiago Rafael; REGINA, Jean Marques. **Direito Religioso:** questões práticas e teóricas. Porto Alegre: Concórdia, 2018. P. 131.

[25] MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. **Curso de Direito** Constitucional.ed. 9. São Paulo: Saraiva, 2014. p.319

Finally, the fact that religious organizations are not subservient to the state, such as tax immunity as a consequence of secularism and not as a privilege granted by it; Constitutional protections concerning the freedoms of belief, worship and conscientious objection demonstrate respect, guarantee and protection of the spiritual order and, consequently, the religious phenomenon.[26]

From this angle, it is possible to verify that the secularity model adopted by the Brazilian state is collaborative with the state, completely distancing itself from the French secularism. That is, the model of the secular state in Brazil grants the right and the guarantee of the exercise of religiosity in all its spheres and through all expressions.

CONCLUSIONS

The influence of religiosity on human and social life, recognized by historians of antiquity and enshrined in international and constitutional documents, allows today different religions and creeds, whether of Eastern, Western, African, etc., to live together in harmony in one another Constitutional State through the principle of secularism.

There are innumerable understandings about this principle and even some controversies about the relationship between the State and the religious phenomenon, which make misunderstandings about the subject spreading the idea that the Brazilian State can adopt a model similar to the French, opponent and combatant of religiosity.

In this sense, it was considered relevant to analyze the constitutional understanding of the relationship model of the Brazilian state with the religious phenomenon. Thus, it was possible to identify that the way in which Brazil relates to religion is through the model of collaborative secularism, which allows citizens, both individually and collectively, the possibility of expressing themselves and manifest their religiosity in the public sphere under a constitutional protection, whether through the presence of symbols, the occurrence of religious meetings in public spaces and even through the sacrifice of animals for religious purposes.

It is important to stress, therefore, that religious freedom should not be understood as a favor of the state, a benevolent concession that allows citizens of a given territory to exercise their faith. The principal foundation of the right to religious freedom and its exercise in society does not come from the figure of the state, but is rooted in the transcendent character of the welfare state itself. That is, the religion. Therefore, its exercise must be respected and safeguarded by it, in order to protect one of the most intimate, sensitive and innate rights of the human person: the right to exercise and practice his religion.

[26] VIEIRA, Thiago Rafael; REGINA, Jean Marques. **Direito Religioso:** questões práticas e teóricas. Porto Alegre: Concórdia, 2018. P. 135 and 146.

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DARK LIGHTING: THE PROBLEM OF ARTICLE 142 INTERPRETATION AT THE BRAZILIAN 1988 CONSTITUTION'S HEART[1]

Thiago Aguiar de Pádua[2]
Airto Chaves Junior[3]

INTRODUCTION

The Brazilian case is quite peculiar, to say very little. Recently, the Brazilian Supreme Court was provoked to express itself about one of the Brazilian constitutional democracy main problems. It should be noted that the Democratic Labor Party initiated a judicial review procedure, through Direct Action of Unconstitutionality nº. 6.457 before the Court, in a petition prepared by attorney Lucas de Castro Rivas because there was, once again, a terrible political ghost roaming our constitutional arena.

In his petition, based on the excessive Brazilian political discretion, and the background of our historical tragedy of disrespect for democracy, coupled with the need to limit President powers and privileges, he mentioned:

It is a great danger even for long-lived democracies. In the United States, this type of conceptual breadth of the President's authority over the Armed Forces - there, Commander-in-Chief - served as a legal subterfuge to retain even criminal law, supporting serious human rights violations, concentration camps for Japanese until, more recently, torture.

That mentioned Brazilian Supreme Court case dealt exactly with the interpretation of the extremely problematic article 142 from the 1988 Constitution. This chapter analyzes that article 142, seeking to reflect about its historicity and pointing out the most complex problems of its constitutional existence. In this chapter we reflect from its historical trajectory, at the heart of our democratic constitutionalism, mentioning the fragility of our democratic culture, in addition to addressing the visible disrespect for the rules of the democratic game. The Brazilian military and Armed Forces have long considered themselves to be “enlightened guardians”, when in fact they are responsible for melting our constitutional culture, always, in fact, based on a strange interpretation of what is today inserted exactly in article 142 from 1988 Constitution.

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[1] Note: Part of this chapter is based on the text prepared to a legal opinion, called “Legal Opinion addressed to Brazilians”, about the article’s 142 from 88 Constitution, unpublished.

[2] Professor at the Strict Sensu Postgraduate Law Program (UDF LL.M. Law Program). PhD, Master and bachelor’s in Law. Former Law Clerk for a Brazilian Supreme Court Justice (for the 2016 Supreme Court term). Professor of Law at University Center of Federal District (UDF). Researcher at Brazilian Center for Constitutional Studies (BCCS/CBEC). Lawyer. E-mail: thiago.padua@udf.edu.br

[3] Professor at the Strict Sensu Postgraduate Law Program (UNIVALI LL.M. and PhD Law Program). PhD, Master and bachelor’s in Law. Professor of Law at Univali. PhD and Master in Legal Science by the Strito Sensu Pós-Graduate Program at UNIVALI in the research field: Constitutional Principiology and Law Policy; also a Legal Sciences PhD at the University of Alicante, Spain. Lawyer. E-mail: oduno@hotmail.com

1. THE FRAGILITY OF BRAZILIAN DEMOCRACY

A reasonable demonstration of our constitutional democracy fragility is found in the fact that we have had many ruptures and few periods of normality, not always democratic. The present moment, at the 21st century first quarter, leads us to make some reflections that demand more than abstract concerns. Dated back to 2001 and, therefore, needing to be very little complemented, let us observe the sharp historical reflections of political scientist Octaciano Nogueira4:

Brazil, from discovery to independence, lived three hundred and twenty-two years without democracy, without vote and without Parliament, although it did not lack many and varied governments. After 1822, we started to have a vote, Parliament and government, but we did not get to have democracy, as we know it today, at least until 1934. Together, there are four hundred and thirty-four of our poorly celebrated five hundred years. A sign of how new and precarious democracy is among us. In those sixty-seven years [in 2020, 86] 5, we have barely started to build it, and we have not yet finished improving it. Not all were years of democracy: twenty-eight of them were dictatorships, civil, from 1937 to 1945, and military, from 1964 to 1984. Congress was dissolved twice, in 1930 and 1937, and temporarily closed on three occasions: 1966 (by complementary act 23), 1968-69 (by complementary act 38) and 1977 (by complementary act 102).

The dissolution of the Parties took place three times, in 1930, 1937 and 1965. Of the twenty-two presidents who held the Presidency, from 1926 to 2003, only three, with the exception of the generals of the dictatorship, completed their terms: Dutra, Juscelino and Fernando Henrique Cardoso, who [was] the first, in the entire period, to receive the presidential sash of his predecessor chosen by direct election and pass it on to a successor invested under the same conditions. Among these twenty-two presidents, there was one suicide and two resignations. Four were deposed, one died during his tenure and another, before taking office. We had a revolution, four coups d'état, four coup attempts and three rebellions. Among the generals of the military dictatorship, none exercised a mandate of the same duration as the others. Costa e Silva remained in power for two years, Castelo, three, Médici, four, Geisel, five and Figueiredo, six.

In other words, it is an extremely fragile democracy, with a tradition of hypertrophy in the Executive Branch, with many coups' d'état, closure of the congress, dissolution of institutions, arbitrary retirement of public employees and even ministers of the Supreme Court in 3 different periods. (1864, 1931 and 1968), in a total of 15 dismissed Supreme Court Justices, institutional ruptures, celebration of coups d'état and demonstrations calling for the closure of the Supreme Court and Congress.

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[4] NOGUEIRA, Octaciano. **A Democracia que Terminou em Tragédia** (prólogo), In: A Constituinte de 1946. Getúlio, o Sujeito Oculto. São Paulo: Martins Fontes, 2005. p. xiii-xiv.

[5] Update information, without highlighting and not included in the original.

The installation of the Constituent Assembly, in February 1987, and its completion on October 5, 1988, with the promulgation of the 1988 Constitution, represents a relevant historical landmark, in addition to its two “birth certificates” (the speech José Carlos Moreira Alves, then President of the Brazilian Supreme Court at the opening of the constituent, as well as the Ulysses Guimarães speech, deputy and president of the National Constituent Assembly).

While Moreira Alves said, in 1987, that the constitution to be drafted was an mere “instrument”, but that it could not quell people's hunger and thirst, and that they should take care of implementing mechanisms to overcome crises (political, economic and social), on the other hand, Ulysses Guimarães repudiated the dictatorship, calling the Constitution that was being born the “Citizen Constitution”, which emerged to implement citizenship of Brazilians.

Far from the desired perfection, or from the expected pragmatism, the 1988 Constitution mirrors human defects and virtues, within a true aura of humanism (fraternity) that represents your soul, due to the need for peaceful, humanistic coexistence and harmonic, far from the poles and extremes that characterize mere politics, in a clear message that, perceptible from the Preamble to the last of the articles of the Transitional Constitutional Provisions Act, invokes democracy and republic, in addition to the dignity of all, without distinction of any kind.

For each possible problem, an answer within the strict framework of the constitutional dream realized. For each unforeseen response, the confession of its incompleteness, in a message of humility, present in the admission of its own change through the mechanism of the Constitutional Amendment, marked by material, formal and circumstantial limitations.

The 1988 Constitution is not a suicidal pact, but the most humane of the civilizing pacts. It is also not a runaway truck with no brakes, on a steep, wet and dangerous slope, but a sober and complex normative that provides the goals for straight government and to prevent runaway. Nor did it create a Republican Federation, but a Federative Republic, when the order of factors totally changes the result, in a context that stems from the previous Brazilian constitutional experience.

2. THE BRAZILIAN CONSTITUTIONAL TRADITION: FROM 1891 TO 1988

There is a serious need to reflect from a historical point of view. With regard to article 142, it is necessary to observe the Brazilian constitutional tradition since 1891, until we reached the tutelary opening of power after dictatorship (slow, safe and gradual) in 1988, when we woke up from the dictatorial nightmare.

In this sense, we need to go through our old Constitutions (1891, 1934, 1937, 1946, 1967, and Amendment no. 1/69), before entering the current constituent cycle, which started in February 1987, and ended on October 5, 1988 which, in turn, involves the Afonso Arinos draft, as well as article 192 from Substitutional Amendment 1 (8/26/1987), article 160 from Substitutional Amendment 2 (9/18/1987), article 167 from Project A (11/24/1987), article 148 from Project B (5/7/1988), and article 142 from Project C (9/15/1988) and, finally, the definitive version in the Systematization Commission.

Below, the different legal forms, as possible genesis, and the remote antecedents of the claim to normativity of article 142:

BRAZILIAN CONSTITUTIONS	TEXT
1891 Constitution	Art. 14 - The forces of land and sea are permanent national institutions, destined to the defense of the Fatherland abroad and the maintenance of laws inside. The armed force is essentially obedient, within the limits of the law, to its hierarchical superiors and obliged to support constitutional institutions. Art. 15 - Legislative, Executive and Judiciary branches are harmonious and independent from each other.
1934 Constitution	Art. 162 - The armed forces are permanent national institutions, and, within the law, essentially obedient to their hierarchical superiors. They are designed to defend the Fatherland and guarantee constitutional powers, and order and law.
1937 Constitution	Art. 161 - The armed forces are permanent national institutions, organized on the basis of hierarchical discipline and faithful obedience to the authority of the President of the Republic.
1946 Constitution	Art. 176 - The armed forces, constituted essentially by the Army, Navy and Air Force, are permanent national institutions, organized based on hierarchy and discipline, under the supreme authority of the President of the Republic and within the limits of the law. Art. 177 - The armed forces are destined to defend the Fatherland and to guarantee the constitutional powers, the law and the order.
1967 Constitution	Art 92 - The armed forces, constituted by the Navy, Army and Military Aeronautics, are national institutions, permanent and regular, organized based on hierarchy and discipline, under the supreme authority of the President of the Republic and within the limits of the law. § 1 - The armed forces are destined to defend the Fatherland and to guarantee the constituted Powers, the law and the order.
First Amendment to the 1967 Constitution, approved in 1969.	Art. 90. The Armed Forces, constituted by the Navy, the Army and the Air Force, are national institutions, permanent and regular, organized based on hierarchy and discipline, under the supreme authority of the President of the Republic and within the limits of the law.

	Art. 91. The Armed Forces, essential to the execution of the national security policy, are intended for the defense of the Fatherland and the guarantee of the constituted powers, the law and the order.

Subsequently, also follows below the different “routes” and article 192 transcription versions after the military dictatorship, with the different texts, until the final form approved in 1988:

THE CONSTITUENT AND THE 1988 CONSTITUTION	
Affonso Arino's Draft	Art. 413 - The Armed Forces, constituted by the Navy, the Army and the Air Force, are national institutions, permanent and regular, organized according to the law, based on hierarchy and discipline, under the supreme command of the President of the Republic.
Substitutional Amendment 1 (8/26/1987)	Art. 192. The Armed Forces, made up of the Navy, Army and Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and intended to defend the Nation, guarantee the constitutional branches of government and, **on their express initiative**, of the constitutional order
Substitutional Amendment 2 (9/18/1987)	Art. 160. The Armed Forces, made up of the Navy, Army and Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and intended to defend the Nation, guarantee the constitutional branches of government and, **on the initiative of one of them**, of law and order.
Project A (11/24/1987)	Art.167. The Armed Forces, made up of the Navy, Army and Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and intended to defend the Nation, guarantee the constitutional branches of government and, on the initiative of **one of them**, of law and order.
Project B (7/7/1988)	Art. 148. The Armed Forces, made up of the Navy, Army and Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and intended to defend the Nation, guarantee the constitutional branches of government and, **on the initiative of any of these**, of law and order.

Project C (9/15/1988)	Art. 142. The Armed Forces, made up of the Navy, Army and Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and intended to defend the Nation, guarantee the constitutional branches of government and, **on the initiative of any of these**, of law and order.
Project D (9/21/1988)	Art. 142. The Armed Forces, made up of the Navy, Army and Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and intended to defend the Nation, guarantee the constitutional branches of government and, **on the initiative of any of these**, of law and order.
Final Text of the 1988 Constitution (5/10/1988)	Art. 142. The Armed Forces, made up of the Navy, Army and Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and intended to defend the Nation, guarantee the constitutional branches of government and, **on the initiative of any of these**, law and order.

Well, the reference contained in the 1891 Constitution is contextualized from the events related to the coup of the Proclamation of the Republic (in 1889), linked to the so-called "Brazilian militarism", masterfully described by Aliomar Baleeiro, reproduced below, although in a relatively long paragraph, justified by context and importance:[6]:

In the monarchical period, the militarism of the Spanish-American republics - source and basis of the typical caudillism of all of them - had sporadic outbreaks in the reign of Pedro I who, after Independence, soon after removing the Andradas, tried to surround himself with officers of the troop of the line, especially the Portuguese by birth, to remain in the military service of Brazil. As soon as, in Bahia, the Portuguese were beaten on 2-7-1823 and embarked by pulse back to the former metropolis, the Emperor guaranteed a place in the Brazilian Army to those who wanted to stay, a fact that generates disgust among patriots wary of preferences Lusophilic throne. Supported by these soldiers, he dissolved the 1823 Constituent, exiled deputies and brutally repressed the revolution that Pernambuco in 1824 opposed to the imperial coup d'état of the previous year.

José Honório Rodrigues exposes this in his book about the 1823 Constituent, published in 1974: 'most of the officers were foreigners. For 98 Portuguese officers, there were only 47 Brazilians. Otávio Tarquínio de Sousa, a historian specializing in that period and a biographer of

[6] BALEEIRO, Aliomar. **Constituições Brasileiras, Volume II: 1891.** 3. ed. Brasília: Senado Federal, Subsecretaria de Edições Técnicas, 2012, p. 35-37.

Emperor Dom Pedro I, says that, at barracks parties, without ladies, he danced alongside the officers. He brought Irish and German mercenaries and even thought of using them to restrict the freedoms claimed by Brazilians, an attitude reflected by his confessor and intimate adviser Frei Arrábida. But these mercenaries, to some extent justified by the Cisplatin War, became uncomfortable and turbulent, until they revolted, and in a reaction of the Brazilians, in Rio, one hundred of them were killed and wounded in street fighting..

When, at last, on April 7, 1831, the people of Rio rebelled against the first Emperor in Campo de Sant'Ana (now Praça da República, in Rio), the troops joined the movement and the stubborn and reckless monarch ended without even having his own guard in the palace of São Cristóvão. The Regency, with great difficulty, relying on the National Guard, a militia of civilians, gradually reduced the line troops in number and, consequently, on the possibility of interfering in the destinies of the country. Pedro II did not appreciate the military appearance or apparatus, due to his humanistic education, which made him administer the Regency. He dressed like a civilian and, when he wore a uniform, he preferred the Admiral's. On the other hand, the proletariat soldiers, in the Empire, were affiliated with the two great Parties and within them acted as civil politicians. Francisco de lima e Silva, father of the future Duque de Caxias, participated in the Regência Trina (…)

The military officers who made the Republic and defended it in 1893, many of whom were positivists, animated by the “esprit de corps”, hinted at Floriano's stay and, even after his death in 1895, secretly conspired to depose Prudente and install the “Scientific dictatorship”, by Augusto Comte. The failure of the attempt against the Chief of the Nation and the murder of Marshal Bittencourt, minister of war, in the defense of Prudente's life, brought this sudden popularity alongside the condemnation of Florianists, mostly military. This allowed Prudente de Morais, at the end of his stormy presidential period, to say that he had pacified the country and consolidated the civil order. And it was true, although it allowed some violence that caused conflict with the Brazilian Supreme Court.

Thus, the wording of articles 14 and 15 of the 1891 Constitution is explained, by mentioning the armed forces as “permanent national institutions”, being “destined to the defense of the Fatherland abroad and the maintenance of laws in the interior”, in addition to “essentially obedient, within the limits of the law, to their hierarchical superiors ”, as constitutional republican norms precursor to the pillars of hierarchy and discipline, who should be“ obliged [s] to support constitutional institutions ”, at the same time as the three powers , mentioned as “organs of national sovereignty”, harmonious and independent from each other.

The historical context, moreover, does not dispense with the description of the previous monarchical period, within which there was intense participation and influence of the military in national destinations, less military than political, and the difficulties of national implementation of

the Armed Forces, as well noted by Nelson Werneck Sodré in his classic "Military History of Brazil"[7].

The 1934 Constitution[8], for the first time, spoke of "national security", and, "the issues connected with it would be studied and coordinated by the Superior Council for National Security, chaired by the President of the Republic and the Ministers of State, as well as by the heads of the army and navy staff (art. 159) ". The structure, therefore, changed to no longer guarantee only constitutional powers, but also "order and law", in a historical moment of the rise of fascism in Europe, which it will find in Italian fascism, especially in the codification of Rocco (1930), its maximum expression. In fact, as recorded by Kristal Gouveia and Arno Dal Ri Jr[9]., about the historical period that influenced us a lot:

The building up of the fascist regime was supported by a series of political, social and legal movements in an attempt to make the domain of the sectors of life of individuals total, using institutions as sounding boards for the objectives of a center of total and unifying power. These are movements that, according to Emilio Gentile, would characterize the Italian fascism imposed by Benito Mussolini since 1924 as a peculiar modality of totalitarianism. [10]

In this context, there is a state conception that attributes "peculiar personality to the State", with the centralization of power, failing to preponderate the protection of individuals, so that the statist aspect is privileged, with the rescue of the institute of "*laesa maiestas*", present idea of the *ancien régime*, something that:

Embodies an important feature of the fascist authoritarian regime: the structural centralization of legal protection to the State, the choice of its elements as protected legal assets and the definition of punishable conduct: These elements are representations of conscious choices made at the expense of individual protection, seen only as instrumental to the state's will (and often opposed to the latter, in which case the state's will should definitely prevail). [11]

This invokes, as well known, the fascist conception of Alfredo Rocco, Mussolini's Minister of Justice, with the opposition against contractualist philosophy and, therefore, against "the notion that state power derives from the will of individuals, who delegate it to according to a given limitation imposed by them. These conceptions, which he calls "ultra-individualist" are diametrically opposed to the ideology of fascism"[12].

[7] SODRÉ, Nelson Werneck. **História Militar do Brasil**. São Paulo: Expressão Popular, 2010.

[8] SODRÉ, Nelson Werneck. **História Militar do Brasil**. São Paulo: Expressão Popular, 2010.

[9] DAL RI JR., Arno; GOUVEIA, Kristal Moreira. A Função da "Personalidade do Estado" na Elaboração Penal do Fascismo Italiano: laesae maiestas e tecnicismo-jurídico no Código Rocco (1930). Sequência, n. 81, p. 226-249, Apr. 2019.

[10] DAL RI JR., Arno; GOUVEIA, Kristal Moreira. A Função da "Personalidade do Estado" na Elaboração Penal do Fascismo Italiano: laesae maiestas e tecnicismo-jurídico no Código Rocco (1930). Sequência, n. 81, p. 226-249, Apr. 2019.

[11] DAL RI JR., Arno; GOUVEIA, Kristal Moreira. A Função da "Personalidade do Estado" na Elaboração Penal do Fascismo Italiano: laesae maiestas e tecnicismo-jurídico no Código Rocco (1930). Sequência, n. 81, p. 226-249, Apr. 2019.

[12] DAL RI JR., Arno; GOUVEIA, Kristal Moreira. A Função da "Personalidade do Estado" na Elaboração Penal do Fascismo Italiano: laesae maiestas e tecnicismo-jurídico no Código Rocco (1930). Sequência, n. 81, p. 226-249, Apr. 2019.

In turn, now under the sign of the Constitution of 1937, from the dictatorship of the Estado Novo, led by Getúlio Vargas, the limits of the law were shamelessly excluded, subjecting the Armed Forces to the exclusive authority of the President of the Republic, consolidating many aspects of a fascist character, in a context that would be repeated uncritically in the other constitutional texts.

Following the previous normative lines, in turn, articles 176 and 177 of the 1946 Constitution, already with democratic opening, again instituted the Armed Forces from the double pillar of hierarchy and discipline, under the supreme authority of the President of the Republic, again restored to the limits of the law, with the functions of defending the motherland and guaranteeing the institutions and the law and order, without forgetting the context that Getúlio Vargas removed from that power cycle, ended up being the "hidden subject of the Constituent", in a game of scene perceived since the annals of the constituent by the political scientist Octaciano Nogueira[13].

Some years later, on March 31, 1964, the advent of the civil-military coup occurred, based on an initial speech of "vacancy of the presidency of the republic", later adjusted with the Institutional Act, of April 9, 1964 , who mentions a curious fantasy disguised as a farce, stating: "The Heads of the victorious revolution, thanks to the action of the Armed Forces and the unequivocal support of the Nation, represent the People and in their name exercise the Constituent Power, of which the People are the sole holder".

It is within this spirit of political-legal farce, by the way, that the Armed Forces, dressed up as Constituent Power, had to hide the opinion polls carried out on the eve of the coup d'état, which indicated that President João Goulart, deposed by the coup , had 70% (seventy percent) approval, and would win the elections of the following year (1965), in other words, what was called the "March Revolution of 1964" was actually nothing more than a "Coup de Instigating Betrayal"[14].

In the same spirit, in effect, subsequent changes were made, with the wording of Article 92, the 1967 Constitution, and Articles 90 and 91 of Amendment no. 1/69, who maintained the essence of the previous Constitution, also from the double pillar of hierarchy and discipline, also under the supreme authority of the President of the Republic, again restored to the limits of the Law, with the functions of defending the Nation and the guarantee of institutions and law and order.

With the return of power to civilians, from the Constituent Assembly (1987/1988), new discussions on the role of the Armed Forces arise, initially with the Afonso Arinos Draft, which, in its article 413, does not innovate at all, maintaining the reproduction of the previous models,

[13] Cf. NOGUEIRA, Octaciano. **A Constituinte de 1946. Getúlio, o Sujeito Oculto**. São Paulo: Martins Fontes, 2005.

[14] BRASIL. Câmara dos Deputados. **Jango tinha 70% de aprovação às vésperas do golpe de 64, aponta pesquisa**. Fonte: Agência Câmara de Notícias. Disponível em: <camara.leg.br/noticias/429807-jango-tinha-70-de-aprovacao-as-vesperas-do-golpe-de-64-aponta-pesquisa/>, acesso em 2020.

supported by the other proposals in the Systematization Committee, from Substitutes 1 and 2 (respectively, articles 192 and 160) and from Projects A, B, C and D (respectively, articles 167, 148 and 142), which ended up forming the approved version and contained in the final wording of the current art. 142 from 1988 Constitution, of October 5, 1988, innovating in the part in which it establishes the three powers as triggers of the request for guarantee of institutions and of law and order.

It is on the final version of article 142 that some jurists have maintained the possibility of "constitutional military intervention", as if the armed forces were a kind of "moderating power".

The jurist Ives Gandra Martins, in a first gesture of interpretation, mentioned that due to a determined Supreme Court decision, if it is understood as "undue", it would authorize the armed forces to carry out intervention "so that they restore law and order, as determined in article 142 of the Supreme Law"[15]. Subsequently, the same jurist Ives Gandra returned to the topic, in the face of the controversy caused, contextualized by countless anti-democratic acts that counted on the presence of the President of the Republic, in which his supporters systematically manifested themselves with signs and calls for support for a "constitutional military intervention." This is the reason why Ives Gandra defended an exotic position. He said that it would be up to the Armed Forces to carry out" punctual moderating intervention, (...) he would say what is the correct interpretation of the law applied in the conflict between Powers, IN HAVING INVASION OF LEGISLATIVE COMPETENCE OR OF ATTRIBUTIONS ", that is, with the Armed Forces exercising the moderating power[16].

In turn, the Attorney General of the Republic, chosen for the first time since 2003 without observing the unwritten constitutional rule (custom and non-judicial precedent) from the list procedure, by participating "in an interview with the program "Conversation with Bial", on TV Globo, [from 6/6] (...), when he affirmed "that a Power that invades the competence of another Power can give rise to an intervention by the Armed Forces".

In turn, another jurist, the former President of the São Paulo Court of Justice, retired Judge Ivan Sartori, and at the time pre-candidate for the position of Mayor of Santos/SP, also spoke, stating that "What is happening in this country is demanding an operation of article 142 of the Federal Constitution. It is not military intervention at all. But the president needs to guarantee law and order and call the Armed Forces because this is a mess" [17].

More recently, Ives Gandra, again consulted on the subject[18], was asked to give a concrete example, saying:

[15] MARTINS, Ives Gandra. **Harmonia e independência dos poderes?** Conjur, de 2 de maio de 2020.

[16] MARTINS, Ives Gandra. Cabe às Forças Armadas moderar os conflitos entre os Poderes. Conjur, de 28 de maio de 2020.

[17] SARTORI, Ivan. 'É inconstitucional', diz Ivan Sartori, ex-presidente do TJSP, sobre decisão do STF. Revista Oeste, de 23 maio 2020.

[18] MARTINS, Ives Gandra. [Entrevista]. **Ives Gandra: Constituição permite 'intervenção pontual' das Forças Armadas**. O Antagonista, em 02 de junho de 2020.

The imaginary example: the Brazilian Supreme Court issues a law and orders the president of the Senate to be arrested for having refused to accept it. "He can appeal to the Armed Forces saying: 'Look, here it is in article 49, item XI, of the Constitution, which determines that it is up to the Legislative to ensure its normative competence'".

The concrete example: for Ives Gandra, in 2015, the then president of the Senate, Renan Calheiros, could have refused the Delcídio do Amaral's order of imprisonment, determined by the Supreme Court. "Senators could complain that Article 53 was disrespected. If they did, the Armed Forces could say: -"Supreme Court, wait a while until the Senate decides. This is trying to restore law and order, "said the lawyer.

Well, on these positions there was a manifestation to the contrary through the opinion prepared by the National Presidency and the Constitutional Attorney of the Federal Council of the Brazilian Bar Association (from June 2, 2020), in defense of the legal order and the democratic state of law, as one of the institutional functions of the Bar Association, for whom the Armed Forces do not exercise moderating power.

The lawyer Adriana Cecílio[19], rescuing the historicity of the constituent debates about art. 142 of CF/88, also noted that although the constituents discussed an alleged moderating role for the Armed Forces, that role was discarded. This is also corroborated by the speeches of the then constituent congressman, Fernando Henrique Cardoso, in dialogue with General Leônidas Pires, and by the memories of José Sarney about the episode with the constituent congressman Bernardo Cabral[20].

The constituent congressman Bernardo Cabral, rapporteur of the 1988 Constitution Systematization Commission, in an interview with Jornal do Brasil (on September 2, 1987), expressly acknowledged the coup environment, already in the constituent, by mentioning: "The draft Constitution now under discussion at the Constituent Assembly, it is, in fact, the result of a climate of insecurity, provoked by the threat of a military coup that ended up being [...] just rumors (...) But, where there is smoke, there is fire"[21].

Nevertheless, it is known that the Constitution does not allow itself to be interpreted in strips, or in pieces, as Brazilian Supreme Court Justice Eros Grau recalls. More than that, especially for those who did not understand the post-1988 democratic moment, or who ignore the historical roots of art 142 itself, and its meaning, will never understand that the 1988 Constitution does not tolerate coups.

[19] CECÍLIO, Adriana. Documentos da Assembleia Constituinte revelam que deputados discutiram e descartaram papel moderador Forças Armadas. Migalhas de 5 de junho de 2020.

[20] CARVALHO, Luiz Maklouf de. **1988: Segredos da Constituinte**. Rio de Janeiro: Record, 2017.

[21] CABRAL, Bernanrdo. [Entrevista]. **Cabral diz que boatos de golpe condicionaram seu anteprojeto**. Jornal do Brasil, política, 2 de setembro de 1987.

The professor Lenio Streck[22] also manifested himself a few times, affirming the inadequacy of some kinds of article's 142 reading, asserting that the "literal content itself - if one wishes to take a textualism - of article 142 precludes the possibility of autonomous action by the Armed Forces without subordination to a civilian power", and, even, "article 142 does not allow intervention military. Any constitutional law course teaches what is the principle of constitutional unity"[23]. It is also worth mentioning the expressive article by jurists Marcelo Andrade Cattoni de Oliveira, Thomas da Rosa de Bustamante and Emilio Peluso Meyer, in the sense that "in the Democratic Rule of Law, legitimacy intrinsically refers to constitutional-democratic legality, because inherent to it"[24].

Well, it is observed that there is no provision in the 1988 Constitution for the Armed Forces to exercise the role of moderating power, either due to the absence of such reference in article n 2, at the constitutional text, which provides, in a topographical and purposeful order, the Legislative, Executive and Judiciary Powers, but there is not any reference to a Moderating Power. In addition, the location of art. 142, within Title V of the Constitution, in the part called "Defense of the State and Democratic Institutions", meaning that the armed forces must respect constitutional democracy, making it quite tragic that it must be said in the 21st century.

3. THE MODERATING POWER AS "THE GHOST" THAT SURROUNDS BRAZILIAN CONSTITUTIONALISM

Brazil adopted the "Moderating Power" in the 1824 Constitution, under the influence of Benjamin Constant[25] who, in turn, was influenced by the writings of Clermont-Tonnerre (Réflexions sur les Constitutions). Analyzing the said Moderating Power, from the point of view of the constitutional monarchical practice of Brazil-Empire, the classic work of Góes and Vasconcellos, to conclude a reasoning on the central point here institutionalized: "The key to political organization is less this or that power in itself than the division of powers, and that the mission of maintaining independence, balance and harmony is not characteristic of any of them, but the destiny of all." [26]

As can be seen, there is a previous political-legal, minority interpretation of jurists who defend that the Armed Forces would expressly exercise the role (and play the role) of a Moderating Power, despite the absence of any provision for a "Fourth Power" in the 1988 Constitution. In addition, two institutions are known to have received the constitutional assignment of defenders of the Legal System and the Democratic Rule of Law: the Public Ministry

[22] STRECK, Lenio. Interpretações equivocadas sobre intervenção militar no artigo 142. Conjur de 7 de maio de 2020.

[23] STRECK, Lenio. Ives Gandra está errado: o artigo 142 não permite intervenção militar! Conjur de 21 de maio de 2020.

[24] CATTONI DE OLIVEIRA, Marcelo Andrade; BUSTAMANTE, Thomas da Rosa de; MEYER, Emilio Peluso. **A Constituição protege o sistema político contra qualquer intervenção militar**. Conjur, de 11 de outubro de 2017.

[25] CONSTANT, Benjamin. Réflexions sur les Constitutions, la distribution des pouvoirs, et les garanties dans une Monarchie constitutionnelle, essentiellement constitué de son Esquisse de Constitution, H. Nicolle, 1814; CONSTANT, Benjamin. Principes de politique, applicables à tous les gouvernements représentatifs et particulièrement à la constitution actuelle de la France, A. Eymery, 1815.

[26] VASCONCELLOS, Zacarias de Góes e. **Da natureza e limites do poder moderador**. Rio de Janeiro: Typ. Universal de Laemmert, 1862, p. 19-20.

(art. 127, 1988 Constitution) and the Federal Council of the Brazilian Bar Association (art. 44, n. I, of Federal Statute n 8.904/94), but not the Armed Forces.

None of the two institutions, however, can carry out intervention (or "intermediation"), but, at most, resort to the judiciary, based on the principle of judicial review (art. 5, n. XXXV, 88 Constitution), seeking the safeguarding the legal order and the democratic rule of law. The lack of understanding of the role of the Armed Forces, present in art. 142, however, is very dangerous, mainly due to the existence of a certain literature that advocates the role of "militant moderator", concealing, however, its coup and rupture character[27]. As José Reinaldo Lima Lopes recalled, observing in a clear way the fact that such a discussion is part of the work of Carl Schmitt, the famous Nazi jurist, regarding the controversy about "The Guardian of the Constitution":

> The debate on Moderating Power continued to be vigorous, especially in the interwar period (1919-1939) as the crisis of liberal democracies in the process of transformation changed. It is worth mentioning only as an example of the work of Carl Schmitt, Der Hütter der Verfassung (The defender of the Constitution) of 1931 in which the question of some body or power with political capacity and electoral impartiality to arbitrate constitutional conflicts is posed. Chapter III begins with a significant note regarding the moderating power of the Empire of Brazil, referring to the theory and practice that had sustained neutral power here. Schmitt draws attention to the fact that the moderating power, explicitly adopted in Brazil and Portugal, is in fact a typical institution in all the liberal bourgeois constitutions of the 19th century, embodied in a 'repertoire of prerogatives and powers of the head of state' (Monarch) or President of the State). [28]

According to Carl Schmitt's[29] own reading, the emergence of a theory of neutral, intermediary and regulatory power - pouvoir neutre, intermedmediaire, et régulateur- (moderator) stemmed from the struggle of the French bourgeoisie "for a liberal Constitution against [Bonapartism] and [the] monarchical restoration". Furthermore, according to the same Nazi jurist, writing under the interpretive support of the Weimar Constitution, which was later destroyed by hermeneutical work in the sense that the executive branch could exercise neutral (moderator) power and, therefore, would be the best Constitution defender, also due to the caricature and bizarre interpretation that the mere fact that there is a constitutional determination of oath (art. 42) in the sense that the president "will defend the constitution", would be sufficient for the effective "guarantee [defense] of the constitution"[30].

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[27] STEPAN, Alfred. **Os militares na Política**. Rio de Janeiro: Editora Artenova, 1975; MORAES, João Quartim de. **Alfred Stepan e o mito do poder moderador**, Filosofia Política, (2): 163-99, 1985; MARTINS FILHO, João Roberto. **O Palácio e a Caserna: A dinâmica militar das crises políticas na Ditadura (1964-69)**. São Paulo: Alameda, 2020.

[28] LIMA LOPES, José Reinaldo. **O Oráculo de Delfos: O Conselho de Estado no Brasil-Império**. São Paulo: Saraiva, 2010, p. 115.

[29] SCHMITT, Carl. **O guardião da Constituição**. Belo Horizonte: Del Rey, 2007, p. 194.

[30] SCHMITT, Carl. **O guardião da Constituição**. Belo Horizonte: Del Rey, 2007, p. 233.

That is, those who advocate the position that the Armed Forces exercise the role of “moderating [neutral] power”, seek, in fact, to make them emulate Hitler's Nazi executive, without any constitutional basis for that in the 1988 Constitution. Furthermore, within our tradition, such interpreters seek to ensure that the Armed Forces begin to exercise, in the republic, that monarchical attribution of the duality of articles 98 and 99 of the Political Constitution of the Empire of 1824, which combine irresponsibility and the sacred element of the Emperor in the exercise of Moderating Power, absolutely incompatible with the republican principle.

They also seem to be unaware, or perhaps worse, about the fact that in the Empire of Brazil the Moderating Power (Fourth Power) was exercised by means of (and before) the Fifth Power, as José Honório Rodrigues[31] called the *Conseil d'Etat* (State Council), making suspicious the hermeneutic claim, since after the Supreme Court make public the recordings of the Council of Ministers meeting (a meeting between the President and all Brazilian Secretary’s, chiefs of all federal executive departments), on April 22, 2020, and it soon becomes clear what kind of collegiate meeting would be the director of an alleged exercise of moderating power, with profanity, hatred of indigenous peoples, disrespect for public employees ("grenade in the enemy's pocket"), clandestine speeches about "arrest of governors and mayors", contempt for small and medium-sized companies ("losing money with small and medium-sized companies"), contempt, violence and omission towards the Supreme Court ("put these vagabonds all in jail. Starting with Supreme Court justices"), in addition to the decision to "arm the population" in a strange way ("send a big message"), and inadequate treatment of an important part of the heritage of all Brazilians, with the theme of the so-called “privatization” (“sell fast the fuc*** bank of brazil”), among other absolutely non-republican speeches, such as the intention to interfere in the Federal Police (a kind of Brazilian FBI) to save the President's family and friends from the dangers of the Law.

In addition, the already fateful (and always regrettable) act of the current President, when attributing to himself the characteristic or claim to be himself the Federal Constitution (“I am the Constitution”). The obvious parallel of the question, of course, lies in the fact that in the Constitution of the Empire of 1824 it was incumbent upon the Council of State to advise the monarch in the exercise of the functions of the moderating power, except in the case of the appointment and dismissal of Ministers of State, according to art. 142, being certain that the functions of the moderating power were provided for in art. 101.

There the problem would be semantic: from “neutral” power (moderator), it would become “involved power” (destructor), as in the Weimar Constitution, under the perspective of Carl Schmitt and his caricatures about “neutral power”. Even in recent readings on the “moderating power”, in a comparative study on the cases of the presidency of the republic in France and Italy, the requirements imagined by Benjamin Constant are not observed, resulting

[31] RODRIGUES, José Honório. **Conselho de Estado: O quinto Poder?** Brasília: Senado, 1978.

much more from a bad adaptation to the Republic, becoming in a legitimation argument, rather than a "limitation" argument[32].

It should be remembered, by the way, that in the Brazilian case, even after the fall of the monarchical regime, two texts are fundamental to understand the rugged path of our republicanism. The first, written by Ernest Hambloch[33], despite the intense controversy it caused, and the invitation to the author to leave the country after its publication, identifies in the Brazilian constitutional praxis remnants of an imperial irresponsibility that suggested the need to adopt a model parliamentarian with moderating power. The second, by Borges de Medeiros[34], sought to improve Presidentialism through the adoption of the Moderating Power, transforming the head of the executive branch into an arbitrary magistrate, rather than a ruler that respects the rule of law.

However, no one has gone so far in trying to insert the Armed Forces into the political turmoil as redemptive of institutional problems, in the role of neutral or moderating power, and those who repeat this assertion seem to have something else in mind, except those who fantasize and enjoy the absurd. In this sense, therefore, if the Armed Forces were a neutral power (which they are not, since art. 142 does not refer to them as "power"), in addition to not being able to be inserted in the bowels of the government, they should have a constitutional position consistent with said expression, with constitutional authorization in the art. 2, and should have the attribution of political participation with regard to checks and balances (checks and balances) when they do not work properly.

Apparently, such a conception of the Armed Forces as "neutral power" or "moderator", in addition to finding no refuge in the constitutional text, nor in Brazilian tradition, except in the visions that boast a rupture pragmatism, seeming to call for action preponderance of the "coup", confusing moderation with a coup d'état, as a kind of "ghost that surrounds Brazilian constitutionalism", dragging its heavy rusty chains, whose clinking of links and fetters makes its image unbearable to the eyes and ears of Balzaquian 1988 Constitution. This is what the readings of Oscar Vilhena Vieira[35], José Reinaldo Lima Lopes[36] and Alfred Stepan[37] suggest, if the reading evidently privileges the sense of democratic constitutionalism.

As a matter of fact, the one who came closest to formally inheriting the tradition of moderating power was the Brazilian Supreme Court, according to the reference of Lêda Boechat

[32] SPONCHIADO, Lucie. **Des usages républicains de la thèse du «pouvoir neutre monarchique» de Benjamin Constant en France et en Italie**. In M.-A. Cohendet et A. Lucarelli, L'équilibre légitimité-responsabilité-pouvoir. Actes de la journée d'étude franco-italienne organisée le 7 novembre 2014 par l'Université Paris I Panthéon-Sorbonne et l'Università degli Studi di Napoli Federico II.

[33] HAMBLOCH, E. Sua majestade o presidente do Brasil: um estudo do Brasil constitucional. Brasília: Senado Federal, 2000.

[34] MEDEIROS, Borges de. **O poder moderador na república presidencial**. São Paulo: Forense, 2018.

[35] VIEIRA, Oscar Vilhena. O Supremo Tribunal Federal: Jurisprudência Política. São Paulo: RT, 1994.

[36] LOPES, José Reinaldo de Lima. **Direitos Sociais: teoria e prática**. São Paulo: Método, 2006.

[37] STEPAN, Alfred. **Os militares na Política**. Rio de Janeiro: Editora Artenova, 1975.

Rodrigues[38], in rescue of the old dialogue of Emperor Pedro II, who was thinking of transferring the imperial moderating power to a Supreme Court "like the one in Washington".

In fact, part of our German tradition, inherited from the previous Representation of Unconstitutionality, imposed, more than subtly, at least from 1965 (EC n 16 /1965) the presence of an objective process (objektives verfahren), without subjects and aimed at pure Defense of the Constitution (Verfassungsrechts-Bewahrungsverfahren)39, coupled with the fact that, as Justice Moreira Alves said, the judicial review is a process that "is not an procedure juridic Action, in the classic, genuine sense of Procedural Law, [being] a political institution"40, implemented by civil-military dictatorship itself, trying to imitate the Kelsenian conception of Constitutional Court (which defeated the post-war Schmittian perspective).

With that, we have in Brazil a Supreme Court (like the of American tradition), from the premises established by the case Marbury v. Madson (1803) and also with influences from the european Constitutional Court model, the latter being certainly above and outside the classic separation of powers, as Mauro Cappelletti41 and Inocêncio Mártires Coelho42 emphasize, making it clear that in such a model, it would be the Supreme Court, and not the Armed Forces, which would have the proximity of exercising a moderating function (or role), although recognizing the various constitutional problems of such a "patchwork" formulation.

4. THE MEANING AND SCOPE OF ARTICLE 142 FROM 1988 BRAZILIAN CONSTITUTION

As seen, the art. 142 has a historicity, although it does not admit the interpretation that it would be permissive or authoritative for the Armed Forces exercise the role (or function) of a neutral or moderating power.

In fact, the art. 142 establishes that they (the Armed Forces) are constituted by the combination of the 3 forces (Navy, Army and Air Force), as permanent and regular national institutions, under an organization that goes back to its double pillar (hierarchy and discipline), repeating the reference that they respond to the "supreme authority of the President of the Republic", and are intended, as provided, for the defense of the Nation, for the guarantee of constitutional powers and, on the initiative of any of these, of law and order.

In the post-1988 non-constitutional scope, the first issue was disciplined through Complementary Statute Law n. 69, from 1991, which provided for "the general rules for the

[38] In this sense: "As Leda Boechat Rodrigues recalls, Pedro II himself, at the end of his reign, asked whether the solution to the Empire's institutional impasses would not be to replace the Moderating Power with a Supreme Court like Washington". RODRIGUES, Lêda Boechat. **História do Supremo Tribunal Federal**, vol. I. Rio de Janeiro: Civilização Brasileira, 1991; VIEIRA, Oscar Vilhena. Supremocracia. Revista Direito GV, 4(2), JUL-DEZ 2008.

[39] MENDES, Gilmar. **Moreira Alves e o Controle de Constitucionalidade**. São Paulo: Feitas Bastos, 2000, p. 17.

[40] BRASIL. Supremo Tribunal Federal. **REPRESENTAÇÃO n. 700**, Rel. Min. Moreira Alves, DJ 27.06.1967, RTJ 45, p. 714.

[41] Cfr. CAPPELLETTI, Mauro. **O controle de constitucionalidade das leis no sistema das funções estatais**. Revista de Direito Processual Civil, São Paulo, v. 3, p. 38, 1961.

[42] COELHO, Inocêncio Mártires. **Apontamentos para um debate sobre o ativismo judicial**. Revista Brasileira de Políticas Públicas, v. 5, número especial, 2015.p. 8.

organization, preparation and employment of the Armed Forces", coming from Complementary Statute Law Project nº 181/1989, sent to the National Congress[43] through the message n. 695/89. Said rule was replaced by Complementary Statute Law n. 97/1999, originating from Complementary Statute Law Project n. 250/1998, sent to the National Congress[44] through the message n. 1.418/99.

Indeed, it is observed that there's no discipline of moderating action, not even present in their explanatory statements, and could not even do so without distorting or disturbing the legal provisions of unconstitutionality, but legislative curiosity is intended, rather, to verify the level and intensity of the Armed Forces' performance from the legal point of view.

With regard to employment for Guarantee of Law and Order, there is the Statute Law (the Decree n. 3,897/2001), in which it is observed the Legal Opinion of the Attorney General of the Union, an organ of legal representation and legal advice of the executive branch (Opinion n. GM-025, of August 10, 2001), who preceded and guided the editing of the aforementioned decree, whose conclusion is as follows:

The use, emergency and temporary, of the Armed Forces, in guaranteeing the law and order - it was seen - occurs after the instruments destined to the preservation of public order and the safety of people and property, listed in art. 144 of the Federal Constitution (cf. Complementary Statute Law n 97/1 999, art. 15, paragraph 2). In other words: the purpose of the use of the Armed Forces is to preserve (or restore) public order, including ensuring the safety of people and property (public and private). And the enhanced preservation (or restoration) is the responsibility of the Military Police, under the terms of the Greater Law.

Thus, in view of the above, we are already in a position to realize that the use of the Armed Forces is something exceptional, always in the "Defense of Democratic Institutions", never exercising an undue and non-existent "role or moderating function", and always dedicated to the performance of its triple constitutional mission, under the terms of art. 142: a) defense of the Nation; b) guarantee of constitutional powers; and, c) guarantee of law and order.

In the first case (defense of the Nation), systematic interpretation leads to the conclusion that there should be a prior exercise of the private competence of art. 84, XIX from Brazilian Constitution, with the declaration of war, in the case of foreign aggression, "authorized by the National Congress or endorsed by it, when it occurs between legislative sessions, and, under the same conditions, decree, totally or partially, the national mobilization", with the participation of the National Defense Council (art. 91), and with the prior decree of the State of Siege, in the form (and according to the strict requirements and deadlines) of art. 137, with authorization from the National Congress, pursuant to art. 49, IV, from the same 1988 Constitution.

[43] BRASIL. Congresso Nacional. **Diário do Congresso Nacional**, Seção I, de 26 de outubro de 1989, p. 12348.

[44] BRASIL. Congresso Nacional. **Diário da Câmara dos Deputados**, de 22 de janeiro de 1999, p. 3228

In the other two cases (guarantee of constitutional powers and guarantee of law and order), it must be a previous Federal Intervention or State of Defense, with the necessary approval from the National Congress, according to art. 34, III and IV, ("putting an end to a serious compromise of public order" and "guaranteeing the free exercise of any of the Powers in the Federation states"), always under the supervision of the National Congress (art. 140) and the provision of accountability (art. 141) of agents and executors, including the President of the Republic, Ministers of State and military (squares and officers) of the Armed Forces.

CONCLUSIONS

As general conclusions, from a constitutional point of view, the Armed Forces were not elevated by the 1988 republican constituent to the role of "neutral power" or "moderator", something that does not even belong to the tradition of the Brazilian constitutionalism in the republican period, and which in the monarchical period involved a complex joint action by the Monarch (considered sacred and irresponsible) under the guidance of the Council of State.

Furthermore, by the way, the admission that the Armed Forces would exercise a kind of moderating function in the republic, in spite of the normative reality (and, therefore, in view of the cleavage between the real country and the legal country) only serves to diminish its democratic function, as well as to hide the coup and rupture action (unfortunately present in a certain part of the national political-legal thought). Therefore, art. 142 from the current 1988 Constitution cannot be interpreted in isolation, nor does it admit an interpretation that ignores the "defense of the state and democratic institutions", that is, the triple constitutional mission of the Armed Forces consists of "defense of the Nation" , the "guarantee of constitutional powers" and the "guarantee of law and order".

With this, they can only be triggered with the previous existence of State of Defense, State of Siege and Federal Intervention, with the participation of the National Congress in the inspection functions, and of authorizing and approving, allied to the inevitable promotion of the accountability of agents and executors. Nor should it be said that the Armed Forces cannot practice ordinary civic and citizenship acts, within the connection with the Law and the pillars of hierarchy and discipline, such as assistance in public service activities, as they are anomalous (non-constitutional) activities attributed by Law and that could be assigned to any federal public servants.

In other words, this is not the request forecasts to guarantee the right to vote by the Superior Electoral Court (Federal Statute n. 4,737/1965), or the possibility of using the so-called "slaughter shot" in the destruction of hostile aircraft, through the Federal Statute n. 9,614/1998, among other hypotheses. Furthermore, the 1988 Constitution is no longer the document of the type that regulated society in the 1930s and, therefore, no longer allows a peculiar interpretation based on the doctrine of national security or a break with contractualism, in privilege to the State. with prejudice to individual rights, typical of fascist societies of the period, that is, the guarantee

of constituted powers and law and order must always privilege the fundamental rights of the 1988 constitutional text, and the separation of powers.

Only in a context of backward enlightenment (dark light) could it be admitted that the Armed Forces could carry out a kind of inspection and moderation of the powers (legislative, executive and judiciary), something that would only occur through the ignoble ignorance of the Brazilian constitutional tradition. Article 142 of the 1988 Constitution, therefore, does not allow any military intervention in politics, precisely because the Armed Forces owe obedience to constitutional (constituted) powers. Anything other than that is nothing more than the will to power, arbitrariness and violence. Something unfortunately common in the rear view of our constitutional trajectory.

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THE POSSIBLE UNCONSTITUTIONALITY OF THE PANOPTIC CONTROL OF THE OFFICE OF THE COMPTROLLER GENERAL (CGU) OVER BRAZILIAN FEDERAL UNIVERSITIES.

Marcos Leite Garcia[1]
Luiz Henrique Urquhart Cademartori[2]
Ronaldo David Viana Barbosa[3]

INTRODUCTION

The Constitution of the Federative Republic of Brazil (CRFB/88) enshrined autonomy for universities in its text. There is no adequate definition and indicative of the actual consequences of this autonomy in the Constitution or in sparse laws. The fact is that universities are established for well-defined purposes. These institutions basically aim at the construction and dissemination of knowledge, making use of teaching, research, extension, innovation and interaction with society.

In no situation university autonomy can be conceived as synonymous with sovereignty or non-compliance to the legal precepts and the governance by the society. However, the opposite of this conception, which disregards differences and different constitutional treatments to the universities, conceives dysfunctional control over these Institutions.

The following research problem has been made from it: Is there similarity between the current model of CGU control on the Federal Universities and the Panoptic of Jeremy Bentham and, in case, it is constitutional? In order to adequately answer the question, the following purposes have been established: i) present notions of the constitutional autonomy of Universities; ii) identify whether there is similarity between the Panoptic Model of Bentham and the control currently exercised by the CGU; iii) present the lawfulness as an element to be considered in the actions of control over Universities.

As a hypothesis, it is argued that the current model of control carried out by the CGU over the Federal Universities is similar to the Panoptic described by Jeremy Bentham. In many respects, it is restricted to infraconstitutional legality and disregards the idea of lawfulness as a measure of control. Considering the autonomy that the Constitution assures to the universities, this model is unconstitutional, in breach to the provisions set forth in Article 207 of the Brazilian Constitution.

In addition, the premise is that the current control system is deeply linked to the idea of legality. The provocation herein is also a possible realignment of the central internal control

[1] PhD in Law from the Complutense University of Madrid. Spain (2000). Conducted Postdoctoral studies at the Federal University of Santa Catarina (UFSC-2012). Professor of the Stricto Sensu Postgraduate Program in Legal Science - Master's and Doctorate Course - at the University of Vale do Itajaí (UNIVALI); And professor of the Master's Course at the University of Passo Fundo (UPF).

[2] PhD in Law from the Federal University of Santa Catarina (2000). Conducted Postdoctoral studies at the University of Granada. Spain (2007). Professor at the Law Graduate Program at the Federal University of Santa Catarina.

[3] PhD student in Law at the Federal University of Santa Catarina (UFSC-2020). Corregidor of UFSC (2018-2020). He is currently Director of Innovation at UFSC.

agency of the Federal Executive, which has been meeting the police and the Public Prosecutor, also the canon for the measurement of proper conduct and control of the administrative acts of these Institutions should consider replacing the idea of control with legality for a verification control with the lawfulness.

Thus, this study aimed to present paths for a necessary reflection about the role of internal control of the Federal Executive Branch, notably related to controls of Federal Universities. The hermeneutic method was used. The research approached the problem qualitatively in a descriptive manner, using the technical bibliographic and documentary procedures.

1. THE CONSTITUTIONAL AUTONOMY OF FEDERAL INSTITUTIONS OF HIGHER EDUCATION IN BRAZIL

Article 207 of the CRFB/88 set forth that "universities have didactic-scientific, administrative and financial and patrimonial autonomy, and will abide to the principle of inseparability between education, research and extension". In general, autonomy means the ability to be governed by its laws. The autonomy of Institutions, however, is not absolute, and it is linked and legitimized by its specific social functions. This autonomy, therefore, is restricted to the purpose they were established, and in this case the functions of the University that are the grounds and define the kind of this constitutional autonomy[4].

Luiz Antônio Cunha states this institution almost millennial has undergone a series of reformulations and has served for different purposes, depending on the time and country in which it is inserted[5]. However, there is a common core for university institutions, an aspect that is present at all times and everywhere, namely the fight for the dissemination and development of knowledge, without external constraints, in a real struggle for autonomy. The University becomes a normative institution, itself a producer of rights and obligations[6].

The Constitution established a specific system for universities. The university autonomy enshrined in the constitutional text is an instrument that aims to and finds its limits in the fulfillment of the purposes of these higher Education Institutions, as well as in the compliance with probity in the management of public resources. The actual university autonomy requires not to confuse Universities with the other agencies of the federal administration, so that control over Universities cannot mean or imply formalistic controls, performed in a routine and bureaucratic manner over the public administration of the State[7].

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[4] DURHAM, E.R. **A autonomia universitária:** extensão e limites. Núcleo de Pesquisas sobre o Ensino Superior (NUPES). Documento de Trabalho 03/05. São Paulo: Universidade de São Paulo, 2005. Available in: http://nupps.usp.br/downloads/docs/dt0503.pdf. Access in: 19 sep. 2020.

[5] CUNHA, Luiz Antônio. Autonomia Universitária: teoria e prática. **Revista da Rede de Avaliação Institucional de Ensino Superior**. v. 10 n. 1, 2005. Available in: http://periodicos.uniso.br/ojs/index.php/avaliacao/article/view/1295. Access in: 02 oct. 2020.

[6] MANCEBO, Deise. Autonomia Universitária: reformas propostas e resistência cultural. In: **Universidade e Sociedade.** Brasília, v. 8, n. 15, 1998, p.51-59. Available in: http://www.anped11.uerj.br/20/MANCEBO.htm. Access in: 26 sep. 2020.

[7] SCHWARTZMAN, Simon. **A Autonomia Universitária e a Constituição de 1988**. Folha de São Paulo, São Paulo, p.a3, 15 nov. 1988. Available in: http://www2.senado.leg.br/bdsf/handle/id/103736. Access in: 05 oct. 2020.

It must be recorded the insertion of the efficiency principle in the constitutional text. Indeed, the Constitution of the Federative Republic of Brazil provided for this principle by Constitutional Amendment No 19/98. It is inferred that among the purposes for this insertion are the need for a management administration, and a search for overcoming the bureaucratic model to an efficient dynamic, based in the good management of the public thing.

The CRFB/88 determined in its text the autonomy of the Universities, and this aspect cannot simply be ignored by the control agencies. In the classification by José Afonso da Silva[8], this is a constitutional rule of full effectiveness and immediate applicability. It should be noted, however, that this self-applicable constitutional prerogative has been exercised in a very limited manner[9].

Important to say the constitutional design of Universities was intended to have a certain degree of self-management and definition of their programs and actions according to their purposes, which basically links them to teaching, research and extension, and to the activities inherent in the scope of these deliveries. In this context, the control to be exercised over universities must be concerned with verifying the fulfillment of the goals and purposes of these Institutions. Control in this respect can never be an end in itself.

The elementary aspect of the legal nature of Universities is a kind of resignification of the hierarchy and binding of these entities, or specifically a hierarchical non-subordination to the Administration[10]. Of course, in a republic this does not mean insubordination to any kind of control or supervision, inherent and typical activities of the Democratic Rule of Law. What deserves particular attention and consideration is that the supervision and control performed over such institutions should consider the repercussions of their legal nature and the constitutional protection that has been ensured to them. Therefore, it is inconceivable that a model of control should disregard these aspects and show an *modus operandi* identical for the entire Government Administration.

Just as the idea herein in not close to the defense of the absence of internal and external control over Universities, it is also noted that such controls shall have the due regard to the constitutional guarantee provided to Universities and shall be guided solely and precisely to the verification of the fulfillment of the purposes of these Institutions, namely teaching, research, extension and innovation. Therefore, interference is not possible in aspects related to disciplinary power, people management, rules and *interna corporis* among others.

Oscar Vilhena Vieira reflects that Brazil has gone into a strong turbulence, marked by an escalation of increasingly harsh constitutional plays, in the words originating from Tushnet

[8] SILVA, José Afonso da. **Aplicabilidade das normas constitucionais**. São Paulo: Malheiros, 1998.

[9] MANCEBO, Deise. Autonomia Universitária: reformas propostas e resistência cultural. In: **Universidade e Sociedade.** Brasília, v. 8, n. 15, 1998, p. 51-59. Available in: http://www.anped11.uerj.br/20/MANCEBO.htm. Access in: 26 sep. 2020.

[10] MEDAUAR, Odete. **Direito Administrativo Moderno**. São Paulo: Editora Revista dos Tribunais, 2007.

“constitutional hardball”, where political and institutional actors began to use their tenure and prerogatives to change the relationships between established powers and create retaliation circles, “(...) only with the aim of inflicting defeats on opponents, escape from legal responsibilities or simply expand power within the constitutional system” [11].

A panoptic control model, hereinafter best explained, is incompatible with the constitutional design established for Universities. The desire to combat the most diverse illegal acts and to remove anything that is contrary to Law and Justice must not disregard the very limits established by the Rule of Law. The spread of autonomous control, of intrinsic value, an end in itself, creator of the idea of an eye that sees and persecutes everything, keeping similarity with George Orwell's “great brother” in his work 1984, will have as its effect only the paralysis of a considerable part of the Government Administration, consolidating the broadcasted administrative right of fear, as well highlighted by Rodrigo Valgas dos Santos[12].

2. THE FEDERAL UNIVERSITIES, THE OFFICE OF COMPTROLLER GENERAL AND THE BENTHAM’S PANOPTIC

The Brazilian Constitution designed, as typically Republican, a system of reciprocal controls over the assignments of the State, with insertion of mechanisms called, since the conception of the American constitution, such as checks and balances. Thus, each of the powers or assignments of the State controls the others, and there is still an internal control of this same Branch.

The Executive is subject to the control of the Legislative (Brazilian Accounting Court, for example) and the Judiciary (judgments), as well as establishing internal control system to the Executive Branch itself (Office of the Comptroller General). In addition, the institutions have internal control mechanisms; in the IFEs, in general, this is the case of internal auditing and office of internal affairs. There is also the Federal Prosecution Service and the Federal Police itself.

This design is supported by the Constitution. Article 70 of the CRFB/88 provides that the accounting, financial, budgetary, operational and patrimonial supervision of the Government and of the entities of direct and indirect administration, regarding legality, legitimacy, economicity, application of grants and revenue waiver, will be carried out by the Brazilian Congress, through external control, and the internal control system of each Branch.

As you see, the control to be carried out by the Brazilian Congress is not restricted to legality, but contains aspects such as legitimacy and economicity. In this design, the House brings together the sovereign will of the people monitors the Branch entrusted with implementing democratically approved laws and government policies that go toward meeting the fundamental rights and dignity of the human person. In this monitoring, the Congress is assisted by the Federal

[11] VIEIRA, Oscar Vilhena. **A batalha dos poderes:** da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018. p. 67.

[12] SANTOS, Rodrigo Valgas dos. **Direito Administrativo do Medo**: Riscos e fuga da responsabilização dos agentes públicos. São Paulo: Revista dos Tribunais, 2020.

Accounting Court (TCU), according to Article 71 of the constitutional text, which also lists the jurisdiction of this Court.

But control is also internally by each of the Branches. Article 74 of the Constitution provides that the Legislative, Executive and Judicial Branches shall maintain, in an integrated manner, a system of internal control to (i) assessing the fulfillment of the targets set forth in the multiannual plan, the implementation of the Brazilian government programs and budgets; (ii) to verify legality and to evaluate the outcomes, in respect to effectiveness and efficiency, of budgetary, financial and property management in Brazilian administration agencies and entities, as well as the use of public resources by entities under private law; (iii) carry out control of credit operations, guarantees and sureties, as well as Brazilian government rights and assets; (iv) support external control in the performance of its institutional mission.

While the TCU works as a true court, the CGU is a kind of line of defense in the risk control and management systems. However, it is not possible to identify or infer among the tasks of these Branches some kind of essential mission to the repression and combat associated with police forces and the Federal Prosecution Service in the fight against corruption. Especially, CGU, this is internal control, which purpose is to assist the good governance and in the regular use of government resources.

Attention is drawn here to the role played by the CGU in the framework of the Brazilian Executive Branch, although its actions may not rarely flow into other spheres, directly or indirectly, simply considering situations such as decentralization or the transfer of credits or values from the Federal Government to States and Municipalities.

The CGU seems to have suddenly converted its direction of action. If there was any expectation that it be an assistant arm to the Administration for the improvement of good government t governance, the last few years have revealed a policing and deeply repressive action. There is an ontological aspect. On the many manner to say what the CGU is, its recent action seems to confront *the being* of this Agency. The reason for being and exist would indicate a set of assignments and tasks that seem to destroy some of the actions currently performed.

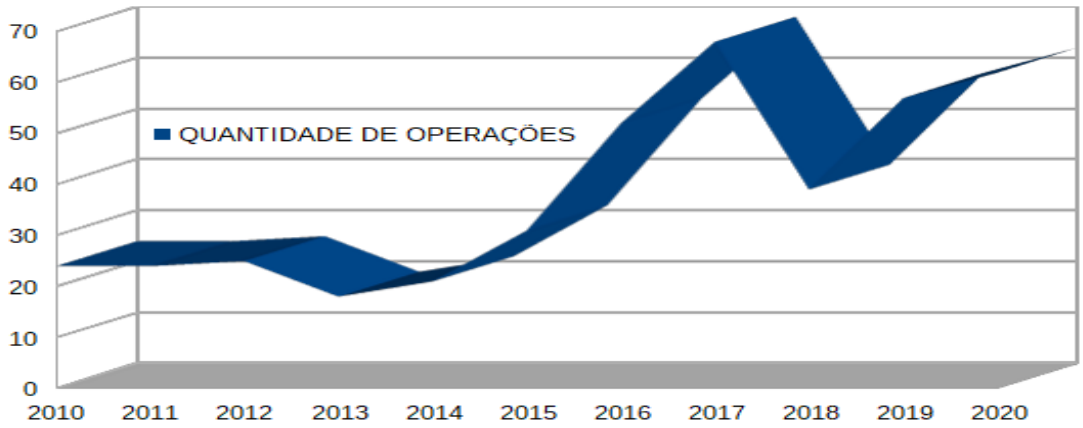
According to data disclosed on the website of the Comptroller's Office[13], only in 2020, CGU participated in 62 (sixty-two) special operations, taking into account those together with “State Defense agencies”, notably police and Federal Prosecution Service. In 2010 and 2011 this number was 24 (twenty-four) operations in each year. About 5 years later, in 2016, there was an increase of more than 100%, totaling 52 (fifty-two) special operations. The need for such operations is not discussed, of course, nor is it questioned how the role of the CGU has been crucial to the feasibility of such operations. A country marked by historical and extremely serious corruption scandals has

[13] The list of special operations involving CGU in 2020, and even in previous years, is available in: https://www.gov.br/cgu/pt-br/assuntos/operacoes-especiais.

indeed taken a long time to seek some strength in the actual fight against corruption and illegal acts perpetrated within the State.

The number of participation of the CGU in the so-called special operations, carried out with police and Federal Prosecution Service, highlights the hypothesis that this control Agency has changed the purpose for which it was designed. The CGU was not and should not be designed to be an arm of the Federal Prosecution Service, nor of the police. The CGU should be set up as an auxiliary institution of the Brazilian Executive Branch in good governance. Next at the current pace, it will perhaps be more feasible to move the CGU from internal control agency to law enforcement or assistance to the Federal Prosecution Service or the police. The figure below shows, per year, and considering the last ten (10) years, the number of special operations that had the CGU's participation.

Chart 1- number of special operations with CGU's participation



Source: Prepared by the author, based on OFFICE OF COMPTROLLER GENERAL (2020).

Adding to this a set of other measures that format the CGU as a kind of great inspector, and, regarding this chapter, with a control performance with a strong repressive and police control, without distinction of characteristics of agencies, and here the specificities and constitutional guarantees launched on universities are of interest. As an example of this, Decree No 10,209/2020, which deals with the sharing of information and documents necessary for the work and activities of the CGU, and those protected by the tax secrecy provided for in the Brazilian Tax Code.

This growth of the CGU as the central control unit and fight against corruption brings to mind the Panoptic of Jeremy Bentham, which, sensitive to the penitentiary situation of the time, notably by the influence of the reformers, for which prisons should cease to be storage sites to be health and correction sites, he suggested a building that would address all the desires of the change that was approaching.

The Panoptic, as a building, consists of a circular construction designed to allow a single inspector to observe all prisoners. This form of construction, in addition to proposing solutions to various problems related to humanity in the application of sentences, based on utilitarian conception, meet the purposes of punishment, reform and economy.

In any case, although Bentham was careful with the instructions of the architectural design, it is important that this text take the Panoptic as a principle. The purpose does not represent exaggerated interpretation, as the author himself pointed out that "Panoptic is not a prison. It is a general principle of construction, the multipurpose surveillance device, the universal optical machine of human concentrations."[14].

The essence of the Panoptic, therefore, is found in the centrality of the inspector's situation. This position would make it possible to see without been seen. We launched a central look to the limited cells from which nothing escaped. By observing the several groups of people to which the model could be applied, it is clear that they have at least one common characteristic: they are people forced to renounce to every initiative, and therefore to be an instrument[15]. Referring to the prisoner, the poor, the mad, the sick:

> To say everything in one word, it will be seen that it is applicable, I think, without exception, to all and any facility, in which, in a space not too large so that it can be controlled or run from buildings, a number of people under inspection should be monitored. It does not matter how different, or even how opposed, the purposes are: whether to punish the uncorrectable, to shut down the insane, to reform the addict, to confine the suspect, to employ the unoccupied, to keep the unassisted, to heal the sick, to instruct those who are willing to in any branch of industry, or train the ascendant race on the path of education, in a word, whether it is applied to the purposes of perpetual prisons in the chamber of death, or confinement prisons before judgment, or penitentiary houses, or houses of correction, or houses of work, or manufactures, or hospices, or hospitals, or schools[16].

In this context, the approximate, integral, unrestricted, omnipresent model of supervision is intended to give fear and a sense of constant surveillance to those who cannot and should not have their creativity and opinions. Universities need freedom. For no other reason has the original constituent established its autonomy.

Therefore, the reference to a Benthamian control model, by the CGU, on the University, has its reason, in addition to the general principle of watchkeeping that everything sees, in minor details such as the fact that, in the Panoptic, the cells should be made of a fine iron grid enough not to obstruct the view of the inspector[17]. Still using the allegory, the university autonomy, if actually observed by the control agency, seems to mitigate the amplitude of its view and control.

Another approach point should be represented in the fact that, through this architectural idea, an "apparent inspector's omnipresence is guaranteed combined with the extreme ease of his real presence"[18]. In this approximation exercise, it is observed that the CGU aims to impose apparent omnipresence, allowing the occurrence of the administrative right of fear, reinforced by its proximity to agencies such as the Federal Prosecution Service and the Federal Police.

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[14] BENTHAM, Jeremy. O Panóptico e a casa de inspeção. In: BENTHAM, Jeremy [et. al.]. **O Panóptico**. Organização de Tomaz Tadeu. Traduções de Guacira Lopes Louro, M. D. Magno, Tomaz Tadeu. 2. ed. Belo Horizonte: Autêntica Editora, 2008. p. 87.

[15] MILLER, Jacques-Alain. A máquina panóptica de Jeremy Bentham. In: BENTHAM, Jeremy [et. al.]. **O Panóptico**. Organização de Tomaz Tadeu. Traduções de Guacira Lopes Louro, M. D. Magno, Tomaz Tadeu. 2. ed. Belo Horizonte: Autêntica Editora, 2008. p. 93.

[16] BENTHAM, Jeremy. O Panóptico e a casa de inspeção. p. 19-20.

[17] BENTHAM, Jeremy. O Panóptico e a casa de inspeção. p. 23.

[18] BENTHAM, Jeremy. O Panóptico e a casa de inspeção. p. 30-31.

The provocation of association of the current model of CGU and the Panoptic model of Bentham is also based in passages such as the one that follows:

> You will be pleased to note that although the most important point is perhaps that the people to be inspected should always feel as if they were under inspection or at least as having a great possibility of being under inspection, this is by no means the only possibility. If it were, the same advantage could be attributed to buildings in almost any way. It is also important for the maximum possible proportion of time, every man should really be under inspection. [...] Not only that, but the greater the likelihood that a particular person, at a given moment, is actually under inspection, the stronger will be persuasion – the more intense, if I can say so, the feeling that he has to be monitored[19].

The hypothesis is the path to a panoptic control model. The constitutional model of control, however, notably that given to Universities, is incompatible with panoptic control. Furthermore, it is not acceptable to have a detached control of the observation of the actual purpose of the controlled institution, but to be held at an end in itself, generating dysfunctionality of this control.

Among the warnings inherent to the discussions herein, it is also possible to remember the State of exception in a context of increased control and repression by the State. Giorgio Agamben[20] says that the state of exception has been transformed for some time a true paradigm of government. The state of exception, in this perspective, has ceased to be an interim and exceptional measure to become government technique. The warning proposes by Agamben, a reflection in its remarkable State of exception is the fact that the suspension of fundamental rights and guarantees has been justified for an enemy sometimes invisible, but capable of generating such a need that it would announce the possibility of suspending the right, in an indeterminate area between democracy and absolutism. An increasingly common *paradigm of government* is, on the pretext of restoring order, security and normality, to implement the totalitarianism.

3. LEGALITY TO LAWFULNESS. CONSTITUTIONAL PARAMETERS FOR CONTROL OF THE ADMINISTRATIVE ACTS OF THE IFES.

The premises raised to date should be summarized as follows: i) Universities have constitutionally assured autonomy; ii) the CGU has moved from an internal control body and auxiliary to good governance to be aid of police operations; iii) this behavioral change of the CGU is transmuted in a type of panoptic control model; iv) an unmeasured control action without considering the specificities of the Universities end on the dysfunctions of this control.

In order to infer the (a)constitutionality of the current model of CGU's control over the Universities, it is important to add another premise: the current control model is linked to the idea of strict legality, disregarding the lawfulness that underlies the country system. If panoptical control is thirsty for dealing with strict fulfillment of legality, whether it is the case of reflection

[19] BENTHAM, Jeremy. O Panóptico e a casa de inspeção. p. 29-30.

[20] AGAMBEN, Giorgio. **Estado de exceção**. Trad. Iraci D. Poleti. São Paulo: Boitempo, 2004.

that the constitutional control model, especially over the IFEs, is based on the idea of lawfulness, the legality of principles or the centrality of the Constitution itself.

The dysfunctionality of the control causes the government manager to be afraid of making decisions. The concern is the understandings and actions of the Federal Accounting Court (TCU), the Office of the Comptroller General (CGU), the Federal Prosecution Service (MPF) and even the Judiciary Branch. The search for something similar to legal certainty has become the obsession of the government manager, as to make a predominant decision according to prevention and precautionary criteria. In this respect, legal certainty, mistakenly understood as an act of not opposing the understanding of the control agencies, has necessarily overlapped in relation to the principles of efficiency and good management of the public thing. The result has been the sedimentation of the administrative right of fear. The reflection of this, too, is the disincentive to the administrator's decision, wishing to take no more risks[21].

There is therefore a severe risk in an undue control over Universities in disregard of their activities and guarantees. The constitutional design of control foreseen for the Universities calls attention beyond the simple letter of law. Dysfunctional and undue control, without paying attention to the roles of the controller, nor of the controlled Universities, places the country on a path which destiny seems not to give attention and importance to the spaces of construction and dissemination of knowledge and learning.

A government officialat these Universities is aware that by taking a public position he also takes on a number of duties and undertakes to comply with a set of prohibitions for the good and proper performance of his duties. Knowing that any action or omission in apparent breach of the established rigors, almost always taking into account strict legality, gives rise to the power-duty of the Government Administration to establish disciplinary proceedings in order to ascertain the occurrence of authorship and materiality and, if applicable, assess a sanction for situations of undiscipline, to an extent considering those actions or omissions in accordance with written legislation , never a "law of principles".

This administrative responsibility[22], understood as a disregard for the letter of the law, in fact generates, an administrative action sometimes more concerned about removing or reducing

[21] GUIMARÃES, Fernando Vernalha. O Direito Administrativo do Medo: a crise da ineficiência pelo controle. **Revista Colunistas de Direito do Estado.** n. 71, 2016. Available in: http://www.direitodoestado.com.br/colunistas/fernando-vernalha-guimaraes/o-direito-administrativo-do-medo-a-crise-da-ineficiencia-pelo-controle. Access in: 29 sep. 2020.

[22] Administrative responsibility, consistent in the duty of the server to be accounted for his actions performed in the state administrative activity (JUSTEN FILHO, Marçal. **Curso de direito administrativo**. 3. ed. São Paulo: Saraiva, 2008, p. 804), or understood as the "that results from non-compliance with rules of procedure of the entity to which he is linked, breach of the correct performance of the position or breach of statutory rules". GASPARINI, Diógenes. **Direito administrativo.** 13. ed. rev. e atual. São Paulo: Saraiva, 2008. p. 244. Meirelles teaches that administrative responsibility comes from the breach of rules, so that the functional fault generates the illegal administrative, which gives rise to apply a disciplinary penalty, always with due attention to legal proceeding. MEIRELLES, Helly Lopes; ALEIXO, Délcio Balestero; BURLE FILHO, José Emmanuel. **Direito administrativo brasileiro.** 38. ed. São Paulo: Malheiros, 2012. p. 285. This sanction is the damaging consequence that the legislator has given to those who breaches the law. COSTA, Nelson Nery. **Processo administrativo e suas espécies**. Rio de Janeiro: Forense, 2007. p. 221.

the risk of accountability than the adoption of measures that actually seek the good of the collective or the fulfillment of the specific purposes of the Institution.

Therefore, one of the effects of excessive control is the real paralysis of the Government Administration. If control takes into account as primacy the strict linguistic rigors of the law, there is a legion of public managers attentive only to what the cold letter of the law establishes, with great possibility of disregarding any path of weighting constitutional principles, however indicated for the specific case.

However, Article 37 of the Constitution lists legality as one of the principles that should guide the management's actions, from 1998, alongside the efficiency. The principles, moreover, as Luís Roberto Barroso teaches, add values, condition the performance of the interpreter, and by their abstraction must help in the unity of the system, and there is no need to talk in a hierarchy between constitutional principles and rules[23].

Considering the efficiency principle with the same degree of normative hierarchy as the other principles of the Constitution, it is not necessary to consider the total separation or absolute reduction of the normative potential of another, notably *the pseudo-conflict* between legality and efficiency[24]. There is no need to talk about the prevalence of the legality principle and this is not a super principle that suppresses and eliminates the others.

The traditional view of administrative law proposes legality as a repository of the highest democratic expectations and power containment. Legality, in this perspective, contains the hope of what is expected in a democracy, including its capacity to limit the sovereign. Another traditional conception is that legality would be the model manifestation of the general will. It would include all wills, and all interests, in a construction procedure capable of preventing the majority from crushing and suppressing minorities[25].

Cyrino maintains that this traditional view centered on the sacredness of legality has failed[26]. The way laws are made in Brazil, especially considering the coalition presidentialism, contributes to the need for at least one skepticism of this view that places the single possible path of the search for the common good in legality, especially if we consider the arrangements and negotiations for the approval of the laws, sometimes have intersections of non-republican interests.

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[23] BARROSO, Luís Roberto. Fundamentos teóricos e filosóficos do novo direito constitucional brasileiro (pós-modernidade, teoria crítica e pós-positivismo). **Revista Academia Brasileira de Direito Constitucional**, n.1, 2001. Available in: https://www.emerj.tjrj.jus.br/revistaemerj_online/edicoes/revista15/revista15_11.pdf. Access in 20 sep. 2020.

[24] GABARDO, Emerson; HACHEM, Daniel W. Responsabilidade civil do Estado, faute du service e o princípio constitucional da eficiência administrativa. In: GUERRA, Alexandre D. de Mello et al. (Orgs.). **Responsabilidade Civil do Estado:** desafios contemporâneos. São Paulo: Quartier Latin, 2010, p. 240-292.

[25] CYRINO, André. **Legalidade administrativa de carne e osso:** uma reflexão diante do processo político brasileiro. Revista de Direito Administrativo, Rio de Janeiro, vol. 274, p. 175-208, jan./abr. 2017. Available in: http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/68746/66665. Access em: 21 sep. 2020.

[26] CYRINO, André. **Legalidade administrativa de carne e osso**. p. 175.

Aiming to demystify legality, especially under the lens of the political sciences, the author presents as premise the fact that the law seeking to positively bind the government administrator is not the crystallization of the general will of the Brazilian people and not the outcome of a cohesive and representative governing body. Of course, the idea is not to abandon legality, but an understanding of realistic legality, which the author has called a legality of meat and bone[27].

André Cyrino in his famous Article on "administrative legality of meat and bone" asks how one can defend the conventional Romantic vision of an Administration blindly bound to the letters of the law when we have: (i) legislative will without majority consensus but from voting order; (ii) the deliberative process does not take into account the common good but agreements in the formation of the coalition; (iii) such agreements involve positions, parliamentary amendments and sometimes non-republican agreements[28]. The guidance of administrative acts, therefore, must be something beyond legality. For this reason too, literature states the substitution of the notion of legality by the lawfulness idea, or a beginning legality, in the idea that the constitution will overcome the law, as the government administration is not only bound by law, rules and regulations, but to the right and especially to the Constitution.

Such circumstances seem to give reason to José Sérgio Cristóvam, by supporting the need for an overcoming of the traditional paradigm of administrative law that bases its actions on a so-called search for an unlimited public interest, giving the Government Administration a series of powers and prerogatives[29]. Perhaps it is necessary to seek dialectics in the search for the required harmony of the constitutional State of Law and a democratic Government Administration, in opposition to any idea of a state action based on an authoritarian, imperative and autocratic model of Government Administration.

CONCLUSIONS

This chapter was concerned to establish some relations between the constitutional autonomy of Universities, control of the Government Administration, legality and lawfulness. Seeking a field of application for the general premises raised, the work completed its observation in the Brazilian Executive Branch. There, the central role of the CGU is highlighted.

Based on data published by the CGU itself, it was possible to perceive a possible shift in the role of auxiliary and guiding of good government governance to a more repressive action and close to the police agencies and the Federal Prosecution Service.

The core role played by the CGU with regard to the control of the Federal Executive Branch, together with the increase in its powers and assignments, such as access to sensitive tax data of

[27] CYRINO, André. **Legalidade administrativa de carne e osso**. p. 181.

[28] CYRINO, André. **Legalidade administrativa de carne e osso**. p. 207.

[29] CRISTÓVAM, José Sérgio da Silva. O Estado democrático de direito como princípio constitucional estruturante do Direito Administrativo: uma análise a partir do paradigma emergente da Administração Pública democrática. **Revista Jurídica Luso-Brasileira (RJLB)**, ano 3, n. 3, p. 575-604, 2017. Available in: http://www.cidp.pt/revistas/rjlb/2017/3/2017_03_0575_0604.pdf. Access in: 28 sep. 2020.

citizens, gives the CGU an eye that sees everything, or at least can see, like Jeremy Bentham's Panoptic design.

The provocation launched here is whether this model is supported by the Brazilian Constitution. This panoptic model, it seems, and although unintentionally followed and applied, finds obstacle in expressed constitutional text, which gives to the University outstanding autonomy, and recognizes purposes and goals dear to Brazilian society.

The closure of this chapter does not offer conclusions or solutions. The effort is for the necessary reflection to be carried out in time on the controls of the Government Administration in the country, which, moreover, has a constitutional duty and to some extent is linked ontologically to the delivery of good practices to society, without tolerance to human, material or moral resource deviations.

Brazilian democracy is recent and the stabilization of its institutions on a recurring basis calls for adjustments and solutions to institutional conflicts. On the importance of the CGU in the fight against corruption and in the internal control of the Brazilian Executive Branch, it is to reflect on its essence, action and course.

Rather than good practice, the reason for being and existing the Government Administration must consider, as Justen Filho teaches, its binding to the realization of fundamental rights, defined on the basis of human dignity. The control should be in this sense and in attention to this aspect. Not as an intrinsic value and purpose in itself. Finally, when it comes to the actions of the State, what cannot come out of the horizon is the duty to carry out, build and deliver the fundamental rights.

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CONSTITUTIONAL BASES OF BRAZIL'S SHIPPING AND PORT REGULATIONS

Osvaldo Agripino de Castro Junior[1]

INTRODUCTION

The Brazilian Commercial Code (CCB), main source of Brazilian Maritime Law, was edited 170 years ago and, together with the Brazilian Civil Code, in force from 2002, which regulates the maritime transportation contract, have not been sufficient to fill the gaps in this modal, especially when it comes to giving effectiveness to the appropriate service.[2] This is based on the Federal Constitution and the regulatory framework of the National Waterway Transport Agency (ANTAQ).

In addition, despite the CCB being reformed by Senate Bill No. 487/2013, there is a kind of malaise of the legality of Maritime Law, given a void arising from the omission of the Legislative and Executive Branches and their interpretation, especially in the face of the complexity of the problems involving the maritime transportation contract, on which sectoral regulation is involved. This scenario makes the effectiveness of the values and principles of the Federal Constitution low, which may be increased with the performance of the regulation made by ANTAQ, created by Act No. 10,233/2001.

In this environment, Konrad Hesse's lesson on the normative power of the Constitution is relevant:

> An optimal development of the normative power of the Constitution depends not only on its content, but also on its praxis. Of all the participants in the constitutional life, it is required to share that conception previously called the will of the Constitution (*Wille zur Verfassung*). It is fundamental, considered globally or singularly. All momentary interests, even if not carried out, cannot compensate for the gain resulting from the proven respect for the Constitution, especially in those situations in which its observance is uncomfortable. As noted by Walter Burckhardt, what is identified as the will of the Constitution shall be honestly preserved, even if, for this, we have to give up some benefits, or even some fair advantages. Anyone who is willing to sacrifice an interest in favor of preserving a constitutional principleconstitutional strengthens the respect for the Constitution and ensures a well of life essential to the essence of the state, especially the Democratic state that abides by the rule.". The one who, on the contrary, does not make himself available to this sacrifice, little by little wastes a capital that means much more than all the benefits obtained, and which, wasted, they will no longer be recovered.[3]

In turn, the Port Law, a legal discipline whose purpose is to regulate the legal relationships that take place around the port and from the port, has a constitutional basis, given the importance of the ports exert on the Brazilian economy. This activity occurs by granting authorization and concession by the government, which is the Federal Government, pursuant to art. 21, item XII,

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[1] PhD in Law (UFSC, 2001). He completed a Postdoctoral internship at the Center for Business and Government at Kennedy School of Government at Harvard University, 2007-2008, with a CAPES scholarship. Professor of the Master's and PhD Program in Legal Science at the University of Vale do Itajaí, Itajaí, Santa Catarina. E-mail Address: agripino@univali.br

[2] In this sense, the Constitution provides as follows on the rights of shippers and the obligation of the appropriate service: "Art. 175. It is incumbent upon the Government, as provided by law, directly or under a concession or permission regime, always through bidding, to provide public services. Sole Paragraph. The law shall provide for: (...) II - the rights of shippers; (...) IV. - the obligation of maintaining adequate service."

[3] HESSE, Konrad. **A Força Normativa da Constituição.** Porto Alegre: Sergio Antonio Fabris, 1991, p. 21-22.

paragraph f of the Federal Constitution, *in verbis*: *"*Art. 21. The Federal Government shall: (...) XII – operate, directly or through authorization, concession or permission: (...) f) sea, river and lake ports:".

In this scenario, is it possible to have a dialog between the Federal Constitution and the Maritime Law and Port Law? Is the infra-constitutional law sufficient to address the gaps of these disciplines? Can the Regulatory Law contribute to the appropriate service in the water transportation sector and ports, through predictability, modicity, punctuality, and efficiency conditions?[4]

Before attempting to help answer these questions, it presents the concept of service appropriate to be provided by maritime carriers and intermediaries according to ANTAQ, pursuant to Articles 3 and 4 of Chapter III, specific on the subject, the Normative Resolution No 18/2017, from ANTAQ:

> Article 3 - The long haul shipping companies and coasting navigation and intermediaries shall note permanently, where applicable, the following conditions suitable to provide the service:
>
> I. standing, by performing frequency and scales offered to the shippers.
>
> II. continuity through maintenance and failure to cease definitely or temporarily interrupt the service in the authorized navigation for more than ninety (90) consecutive days or, in the case of companies that fall within small business - ME or small-sized companies - EPP, as defined in the National Statute of Small-Sized and Small Businesses, for more than one hundred eighty (180) consecutive days, in both cases, subject to the acceptance by the justification duly evidenced by ANTAQ.
>
> III. efficiency, through:
>
> a) compliance with performance parameters contractually established by seeking the best possible results and the continuous quality and productivity improvement.
>
> b) using operational procedures to prevent loss, damage, loss of cargo or waste of any kind, due to the lack of method or rationalization in performance while minimizing costs to be borne by the shippers, and
>
> c) diligent execution of their operational activities, so as not to interfere and to minimize the possibility of damage or delays in the activities performed by third parties.
>
> IV. security, characterized by compliance with safety best practices of maritime traffic, in order to preserve the environment and physical integrity and property of shippers, cargo and port facilities used, and any other determinations, rules and regulations relating to security issued by the competent authorities or by treaties, international shipping conventions and agreements ratified by Brazil.
>
> V.today, characterized by the provision of the service with constant modernization of techniques, vessels and equipment used, as well as with capacity building and training of employees by ensuring the improvement and expansion of the services.
>
> VI. generally, ensuring the provision of services, indiscriminate and isonomic manner to all users, to the fullest extent possible.

[4] In the port sector, Resolution No. 3,274/2014 from ANTAQ stands out, which provides as follows: "Art. 1 This standard is intended for the administrations of organized ports, for the lessees of port areas and facilities, for port operators and for the authorization of port facilities provided for in art. 8 of Act No. 12,815, dated June 5th, 2013, and aims to establish obligations for the port administration and for the provision of adequate service, as well as defining the respective administrative violations, pursuant to Act No. 10.233, dated June 5th, 2001 and Act No. 12,815, of June 5th, 2013."

> VII. modicity, characterized by the adoption of prices, freight, fees and surcharges on a fair, transparent and non-discriminatory basis and that reflect the balance between the costs of providing services and the benefits offered to the shippers, allowing for the improvement and expansion of services, in addition to adequate compensation, and
>
> VIII. punctuality, by meeting the terms fixed or estimated to provide services established by contract, formally scheduled between the parties involved or reasonably required by taking into account the circumstances of the case.
>
> Art. 4 The maritime shippers and intermediaries shall provide correct, clear, precise and overt information, especially to prior knowledge of all services, operations or availability to be hired by the shippers, including specifying the applicable price values, freight, fees, and surcharges.
>
> Sole Paragraph. The information stated in the head provision of article shall be accessible clearly and precisely, until contracting, to the shipper, consignee, endorser or bearer of the bill of lading - BL, regardless of being a contractor or not.

In view of the concentration of shipowners of container shipping, the defense of competition was also included in the referred rule, according to its Art. 5 below, since it is essential for the shipper's defense and, in turn, effectiveness of the adequate service, see:

> Art. 5 Maritime shippers and intermediaries shall refrain from practices harmful to economic order through acts of whatever kind, regardless of fault, which have as their object or may have the effect, if not achieved, to limit, distort or in any way impair free competition or free enterprise, arbitrarily increase profits, or abuse a dominant position.

In the international maritime navigation sector (long haul), it is important to mention that its exploration has strong connections with the state apparatus, aiming at monopolistic commercial exploitation, as occurred with Portugal, the Netherlands and Great Britain. An example the British East India Company:

> (...), incorporated by Royal Charter in 1600 and closed in 1858 when the British government took office. Established to defend and increase Great Britain's control over India's trade, in particular against the Netherlands, it became a capital company with an effective monopoly on much trade in India, particularly in spices, agricultural raw materials, opium, and textiles. (...) It developed a backward integration with factories and other local businesses, and so organized the international production. At its peak, the company operated with almost state powers by coining its own currency, exercising civil and criminal jurisdiction and maintaining its own army of thousands.[5]

1. MARITIME LAW AND PORT LAW: INTRODUCTORY ISSUES AND RELEVANT CONCEPTS

1.1 Maritime Law

1.1.1 The maritime transport in the globalized world

The globe has 27% of its surface formed by continents and 73% of maritime areas, [6] which it means that about more than 90% of goods are carried by sea. This commercial activity involving water transportation (*business shipping*) is defined as the physical movement of goods and people from supplying ports to demand ports, as well as the activities required to support such a movement.

[5] HELD, David; McGrew, Anthony; Goldblatt, David; Perraton, Jonathan. **Global transformations:** Politics, economics and culture. Stanford. Stanford University Press.

[6] MOURA, Geraldo Bezerra de. **Direito da navegação.** São Paulo: Aduaneiras, 1991, p. 65-66.

The economy of maritime transportation is quite complex, whether it is the amount of industries and services that dynamic cluster maritime [7] demand or the high values required for a maritime expedition. [8]

It is industry that requires a great synergy between the different product supply chains (mining, steel, shipbuilding, [9] among others) and service providers (marine engineering, finance, legal services, among others), operating in the transnational network, so that the State's role, through the independent sector regulation with the normative force of the Brazilian Federal Constitution, is crucial..

In turn, the degree of specialization of shipping companies is great and the successful business model of such companies, due to the dynamism of international trade, especially by the impact of technology, including the construction and commercial operation of ships without crew may change in the near future.[10]

1.1.2. MARITIME LAW

The maritime law is the legal discipline [11] which aims to regulate the relations that occur on the ship and from the ship, so the set of legal rules governing the activities required that the vessels to arrange the transfer via waterway, especially with regard to civil liability.

It is an autonomous legal discipline, [12] which has, even given its relevance, constitutional seat (art. 22, paragraph I, of the Federal Constitution), and mainly aims to regulate legal relationships that take place around the ship, [13] considered herein kind of vessel, [14] by means of legal relations that occur through transportation contracts [15] and chartering of vessels, naval mortgage, [16] registration vessel, [17] among others.

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[7] About the maritime cluster generated by the development of the Brazilian coastal navigation: CASTRO JUNIOR, Osvaldo Agripino de; LACHMANN, Marianne Von. **The value of the Brazilian Coast Navigation in the view of carriers.** Presentation held at the First National Seminar on Coastal Navigation. Organized by ANTAG and Syndarma Available at: <www.regulacao.gov.br>. Accessed in: December 10th, 2019. In Europe: WIJNOLST, N. (Dir). **Dynamic European Maritime clusters.** Amsterdam: IOS Press, 2006.

[8] About the Theme: STOPFORD, Martin. **Maritime Economics.** London, New York: Routledge, 2004; BRANCH, Alan E. Elements of Shipping. 8th ed. London, New York: 2007.

[9] Shipbuilding has played a key role in the economies of industrialized countries, so that it is relevant to the comparative study of the historical process of the State's role in financing this sector, including on the economy of convenience flag (flagging out) exerted by governments (p 203-206) and the role of OECD and South Korea (ROSA, Angelo L. Contrariety: Divergent Theories of State Involvement in Shipping Finance Between the United States and the European Union. **Tulane Maritime Law Journal**, v. 29, p. 187-216, 2004-2005).

[10] LORANGE, Peter. **Shipping Company Strategies:** Global Management under Turbulent Conditions. London: Emerald, 2008, p. 185.

[11] The reference to the set states the ordering of these standards in a system by avoiding contradiction and gaps. JUSTEN FILHO, Marçal. **Curso de Direito Administrativo.** 4. ed. São Paulo: Saraiva, 2009. p. 1.

[12] This is the same understanding of: ARROYO, Ignacio. **Compendio de Derecho marítimo.** 2. ed. Madrid: Tecnos, 2002, p. 22.

[13] It has three requirements not common to all vessels: robustness, tightness and win the fortunes of the sea. As a type of the vessel genre, every ship is a vessel, but not every vessel is a ship.

[14] According to art. 2, item V of Act No. 9,537/1997.

[15] Regarded as one made between the shipper and the carrier through which it is obliged under its custody, the transportation via waterways, from one port to another, goods or person, and that agrees to pay a fee for this service, referred to as freight.

[16] It is made in the Maritime Court, according to Act No. 2,180/54.

[17] Pursuant to art. 2, item XVIII, of Act No. 9,537/1997: "Vessel Property Registration - registration with the Maritime Court by issuing the Maritime Property Registration Provision."

As the Maritime Law deals with the commercial shipping through waterway means performed by vessels, therefore it includes the navigation of vessels on rivers, lakes, canals, straits and bays, or in waterway transportation.

It should be mentioned that the Maritime Law is a mixed right, because it has rules of private law and public law, and includes the maritime traffic, comprising commercial ship exploration activity. It should not be confused, however, with the Maritime Navigation Law, inserted into the public law because it has as its object the maritime traffic, covering the transit of vessels, for the navigation safety.

It is discipline that, given the international nature of water transportation, has a high degree of internationality and complexity, [18] and requires trained professionals to handle their specificities. From the creation of ANTAQ, a federal agency with national regulatory powers by means of Act No. 10,233/2001, it increases the need for the constitutionalization of Maritime Law, especially through its transportation contracts, which are most often imposed unilaterally, by the carrier to the shipper, chartering, towing, among others.

Thus, the dichotomy public law vs. private law is no longer relevant in view of the public-private nature of the legal relations arising from the sectoral regulation based upon the Federal Constitution, especially under art. 174, head provision of article of the Federal Constitution, in verbis: *"*Art. 174. As the normative and regulating agent of economic activity, the State shall, in accordance with the law, play the supervisory, incentive and planning functions, which is binding for the public sector and indicative for the private sector. "

It is urged that the Maritime Law is not to be confused with Port Law, although in everyday life, for example, many damage occurs in port storage or in handling cargo outside the ship, so it is relevant to identify the Incoterm (International Commercial Term) to analyze responsibilities.

In this scenario, according to Tetley:

> Maritime Transportation has led to the development of an important part of public law and private law. In private law, general average, rescue, chartering and maritime insurance are among the oldest principles developed in response to these struggles of maritime trade, and that spread principles equivalent in countries of Roman-Germanic tradition and Anglo-Saxon. This conflict of laws has grown, to a large extent, from the international trade in different seas, which caused the Medieval Europe, the birth of transnational Lex Mercatoria including transnational Lex (Law Merchant) maritima (maritime Law).[19]

[18] In comparative law, it is relevant to mention, given the complexity of the Maritime Law, the diversity of regulated subjects (ROSE, FD. **General Average: Law and Practice**. 2nd ed. London: LLP, 2005). The work compares the provisions addressing the general average of the 2004, 1994 and 1974 York-Antwerp Rules, 1974 based on Association of Average Adjuster's Rules of Practice; CLARKE, Malcolm; YATES, David. **Contracts of Carriage by Land and Air.** London: LLP, 2004. The book thoroughly analyzes the clauses and comments on major international conventions and agreements of the sector; GLASS, David A. **Freight Forwarding and Multimodal Transport Contracts.** London: LLP, 2004. The book, through case studies, deals with the contracts used by maritime transportation operators related to the movement of goods, including freight forwarders, suppliers, operators and multimodal container operators, and covers the conventions applied to the international contracts.

[19] TETLEY, William. **International Maritime and Admiralty Law**. Québec: Éditions Yvon Blais, 2002. p. 4. About the history of Maritime Law and Admiralty, p. 3-30.

It should be noted that the application of the institute of the uses and customs, along with the rhetoric of seeking universality of the Maritime Law, based on contractual freedom and autonomy of wills, has limits to be imposed by domestic public order. This should prevail in this case, when it conflicts with claim of the incidence of such Lex Maritima.

There is no doubt that the increasing trivialization of uses and customs in Brazilian Law, as seen, for example, the collection actions of demurrage of containers without prior agreement and with values that violate the modicity, [20] it is a reduction of shipper's rights. This can give rise to evasion of constitutional rights such as the service to be provided by the independent sector regulation.

1.2 Port Law

Worldwide the Law Port has (*Port Law – Derecho Portuario – Droit Portuaire*) undergone transformations, especially the demands for greater efficiency and sustainability that technology and the rising capacity of vessels impose on countries that use the ports for connectivity of its economy and, in turn, of economic globalization.

In addition, the concentration in maritime transportation, especially the fusion of container shipping carriers, as well as acquisition of port terminals, including Brazil, a phenomenon called verticalization, demand greater economic regulation by the State in which such changes occur.

As an example, consider the case of verticalization of two of port terminals located in the Port Complex Itajaí-Navegantes, providing services without price limits, which means that although ANTAQ has sufficient legal provisions for practical punish violations of predictability and modicity, this has been ineffective. [21] Indeed, the economic regulation model has proved to be inefficient as it is *ex post*, and not *ex ante*, which enables the service provider a freedom of prices that may be hindered only when damage provokes the regulator, so there is the ceiling price.

In this context, it could not be different in Brazil, since the Port Law has undergone great changes since the enactment of the Port Law (Act no. 8,630/1993), since repealed by Act No. 12,815/2013, with inhibition of increasing effectiveness of the appropriate service, in part, caused by the omission of the recipient port service: the shipper.

This is also due to the institutional deficit in the sector and the lack of understanding by regulators, especially the shippers, about the limits and possibilities of the regulatory framework in the search to keep up with the demand for effective and sustainable infrastructure that the world economy requires..

As seen, after more than seven years of the edition of Federal Prosecution Office no. 595/2012, converted into Port Act no. 12,815/2013, which revoked the Port Act no. 8,630/1993,

[20] On the subject, see: CASTRO JUNIOR, Osvaldo Agripino de. **Teoria e Prática da Demurrage de Contêiner.** Prefácio Prof. Dr. Norman Augusto Martínez Gutíerrez (IMLI, IMO). São Paulo: Aduaneiras, 2018.

[21] CASTRO JUNIOR, Osvaldo Agripino de; RODRIGUES, Maycon. **Direito Portuário**: Modicidade, Previsibilidade e defesa da concorrência. Florianópolis: Conceito, 2019, p. 232.

and, despite the increase in the number of private terminals, with the offer of more services, there is no methodologically adequate study that proves the reduction of port logistics costs. Additionally, there is no competition protection policy and norm with criteria that identify violations of the economic order and policy of incentives for the creation and diffusion of shipper associations in the sector's normative production process.

In contrast, with the possibility of verticalization (shipowner being a partner terminal) without any State control, say ANTAQ on such operation, especially in the conducts, and concentration of transnational shipowners of container transportation and their intermediaries, which continue operating without authorization grant by ANTAQ. Thus, despite the edition of the Maritime Regulation (Normative Resolution no. 18, dated December 26th, 2017), the evidence points in the opposite direction, that is, in the increase of logistical costs by reducing the competitiveness of products.

Moreover, it is important to implement the guideline for guaranteeing the reasonable tariffs and prices in the port sector provided for in Act No. 12,815/2013. This is a special rule and should be applied if the abuse is found.(*lex specialis*) Consider the provisions mentioned:

> Art. The exploitation of organized ports and port facilities intended to increase the competitiveness and development of Brazil shall follow the following guidelines:
>
> (...)
>
> II - guarantee of moderation and advertising of tariffs and prices in the sector, the quality of the reported activity and the realization of the shippers' users.

Therefore, there is no way to deal with the competitiveness and sustainability of the Brazilian transportation array without prioritizing the effectiveness of the sectoral port policy. After all, without efficient ports, changing the transportation array, mostly founded in road transportation to the maritime mode, is increasingly distant.

Paradoxically, there is also a huge gap between the world of the economy (market) and the effectiveness of port regulation, which should prioritize the public interest, not to be confused with the right of public administration. After all, the administration can not violate fundamental rights.

Within this framework, Port Law emerges, one of the oldest and most traditional legal disciplines, regarded as autonomous, and whose object is to regulate activities that take place in the port (public and private) and from the port.

One should bear in mind that, from June 2001, as it occurs, for example, in the United States, through Federal Maritime Commission with the enactment of Act No. 10.233, the Brazilian port activity has a specialized regulatory agency to regulate and develop the port sector and water transportation (domestic and international) [22] by the interdependence of the activities, ANTAQ.

[22] It is important that the Ministry of Infrastructure together with ANTAQ develop international maritime transportation in Brazilian flag vessels. In addition, it is important to regulate the foreign flag vessels operating in Brazil and especially give effect to the

In addition, there are multi-sector state regulatory agencies, which operate through the cooperation agreement, for the purpose of support activities of state agencies such as the Regulatory Agency of Public Services of Santa Catarina (AGESC), according to an agreement no. 01/2009- DG, signed between ANTAQ and AGESC, for monitoring purposes in the inland navigation area.

The same is true of the Maritime Law, whose purpose is to regulate the legal relationships that occur on the ship and from the ship and therefore water transportation. Furthermore, the sector is dynamic and can not (should) expect the slowness by the Brazilian Congress so it can regulate by law. Therefore, the normative powers of ANTAQ through resolutions, with due regard to the regulatory framework of the sector.

Besides the need for greater effectiveness of the Brazilian Federal Constitution in the production of regulatory law, the *Law and Development*, where the institutional environment, considered here as one that allows the production, interpretation and application of the regulatory framework, [23] it plays a key role in encouraging development, water transportation, and port sector.

A hypercomplex society requires, at least, complex procedures, which requires legal microsystems and thus more specialized legal disciplines such as Maritime Law, Port Law and Regulatory Law in this sector, with specific and distinct sources of traditional branches of law, including Criminal Law, Civil Law, and Labor Law.

In Brazil, these sources of Maritime Law, almost 100% dependent on fleets of foreign flags, especially of (in)convenience, [24] are applied almost automatically and uncritically by law operators and, generally, they stem from the production of *Lex Maritima* abroad.

Such practices and customs therefore lack legal filtering criticism that includes the effectiveness of interests, by the order, the Brazilian shippers of water transportation and Brazilian carriers, also referred to as EBNs (Brazilian Shipping Companies) in the sectoral regulatory terminology

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principles of modicity, predictability, and protection of competition. This regulatory omission, for example, in relation to THC (Terminal Handling Charge - wharfage service) has harmed greatly the tax revenue of the government entities, especially port cities, the evidence of tax evasion, especially ISS [Municipal Services Tax] Service] and IRPJ [Corporate Income tax], reduced port costs and increased competitiveness of our products in foreign trade.

[23] The regulatory framework, which is the set of normative parameters that have greater stability and which can be adapted/updated in the future, according to Alexandre Santos de Aragon, "(...) it provides the necessary stability for investors in public services, whose delegation contracts have been made for decades, although the full legal security is impossible to achieve in the contemporary world and even less when it comes to activities for which the public administration has ius variandi to constantly adapt them to the evolution of public interests. The regulatory framework should not stifle the adaptation of public service to the political and social evolution of the company and leave room where regulators can move in each situation, establish the rules that best meet the public interest, always respecting the basic guarantees of delegates and shippers are always respected." (ARAGÃO, Alexandre Santos de. O marco regulatório dos serviços públicos. In: **Interesse Público.** vol. 6, no. 27, Sept./Oct. 2004. p. 72-90).

[24] About the Theme: CASTRO JUNIOR, Osvaldo Agripino de. **Marinha Mercante Brasileira:** Longo Curso, Cabotagem e Bandeira de (in) conveniência. São Paulo: Aduaneiras, 2014.

Therefore, there is no way to confuse Maritime Law with the Sea Law and Maritime Navigation Law, nor with Port Law. [25] That is an autonomous discipline, with an object and sources of law different from those mentioned above. It should also be added that all disciplines are related to the Constitutional Law, a subject that will be further addressed.

2. REGULATORY LAW: CONSTITUTIONAL FOUNDATIONS

In this scenario, the independent sector regulation is relevant, as the Maritime Law and Port Law are greatly influenced by the Constitutional Law (art. 174, head of the article the Brazilian Federal Constitution) and, thus, the Regulatory Law of water transportation and port activities, whose purpose is the sectoral regulation of maritime transportation, which incorporates the ship and the port, considered the sea lungs, where the ship loads and unloads its goods and where the conflicts occur between public order and international law. (*goods*)

Thus, it is necessary to transcribe the provision of the Federal Constitution that deals with the State's Duty to regulate economic activity: "**Art. 174.** As the normative and regulating agent of economic activity, the State shall, in accordance with the law, play the supervisory, incentive and planning functions, which is binding for the public sector and indicative for the private sector. "

On the concept of regulating, the lesson of Paul Márcio Cruz applies:

> Regulating is subject to rules, direct, norms. It also means establishing rules for certain activities. Intervening means taking part. It means being or being present through an activity. It not only establishes rules but also participates as subject to regulation.[26]

Commenting on the constituent's intention about the role of independent sector regulation, including in the transportation sector, Paulo Márcio Cruz teaches thus:

> The constitutional provisions continue translating an indicative of socialization of strategic sectors of economic life and prioritization of social welfare. As a consequence of this, the role of the State as a driver and guider for the economy has been preserved. As an example thereof, it can be noted the following: (...) b) The availability of many instruments of guidance and regulation of the economy. Without necessarily turning the economic activity into a public activity, the Constitutions have provided the State with instruments for planning and regulation of the economy, usable with different intensities. (...) On some occasions, the establishment of constitutional bodies to develop and assist the Government in these tasks is observed, as it occurs in Brazil with regulatory agencies (Oil, Energy, Transport etc). [27]

This discipline is therefore relevant in view of its relationship with the Maritime Law, especially because foreign cargo and passenger carriers operating in Brazil operate without authorization from ANTAQ. They violate the regulatory framework (Brazilian Civil Code - art. 731, and Act no. 10,233/2001 - art. 14, item III, paragraph e), that is, without effective regulation that can defend the interests of shippers.

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[25] On discipline, see: CASTRO JUNIOR, Osvaldo Agripino de. **Direito Portuário e a Nova Regulação.** 2. ed. São Paulo: Aduaneiras, 2019.

[26] CRUZ, Paulo Márcio. **Fundamentos do Direito Constitucional.** Curitiba: Juruá, 2002, p. 199.

[27] CRUZ, Paulo Márcio. Fundamentos do Direito Constitucional, p. 211.

The Competition Law, also with constitutional basis (art. 173, § 4, of Brazilian Federal Constitution/88) [28] is relevant, especially by protectionist practices in developing countries, despite participating in the World Trade Organization. In this scenario of inequality and unfair practices, the lesson by Pierre Bauchet is important: "With commercialism reviving, transportation may not become an element of 'good trade,' more an instrument of domination, as Colbert in the past used to say." [29]

The Maritime Law also is greatly related to the Public International Law, since as the ship sails on several seas, and is intended for various ports in different countries, in addition to its own nationality and crew often with different nationalities. It is greatly regulated by international treaties, especially edited by IMO (International Maritime Organization), ILO (International Labor Organization) and WTO (World Trade Organization), among others.

The Maritime Law operates in several legal areas and is dialectical tension between national law and international law. [30]It should be added that the Maritime Law also has branches of law directed to the objects of the specifics of the ship's performance, such as Labor Maritime Law, [31] Tax Maritime Law, Social Security Maritime Law and Environmental Maritime Law. [32]

2.1 Constitutional Foundations

Can the Brazilian Federal Constitution, through art. 22, paragraphs I and XXI, f; art. 170 (principles of economic order), especially that of the shipper's defense and the defense of competition; art. 174, head provision of article (State intervention in the economic domain by way of regulation) and art. 178, head provision of article (Principle of reciprocity in international shipping), contribute to a hermeneutics and an argument of Maritime Law and Law Port from the

[28] Art. 173. Except as provided in this Constitution, the direct exploitation of an economic activity by the State shall only be allowed when necessary to the national security imperatives or to the relevant collective interest, as defined by law. (...) § 4 The law will repress the abuse of economic power aimed at domination of markets, the elimination of competition and the arbitrary increase in profits.

[29] Avec le mercantilisme renaissant, le transportation risque de ne plus être un élément du 'bonne commerce', mais un instrument de domination, comme Colbert l'avait d'ailleurs conçu (BAUCHET, Pierre. **Les transports mondiaux, instrument de domination.** Paris: Economica, 1998. p. 274).

[30] Over national law and international law as well as about the French International Register (RIF) and the difference between international and intra-Community shipping (CHAUMETTE, Patrick. Marine marchande, navegations et espaces juridiques. In: GUILLAUME, Jacques (Org.). **Les transports maritimes dans la mondialisation.** Paris: Harmattan, 2008. p. 233-244).

[31] On the subject: ZANINI, Gisele Duro. The Application of Lex Fori in the Maritime Labor Processes with international connection who work in Brazilian Maritime Spaces. Dissertation (Master's Degree) - Master's and Doctorate Program in Legal Science at the University of Vale do Itajaí. Itajaí, 2009.

[32] For greater depth on the subject, in the Brazilian law: CASTRO JUNIOR, Osvaldo Agripino de. Aspectos destacados da proteção ao meio ambiente marinho no Brasil. **Revista de Direito Ambiental**, v. 43, p. 222-245, 2006. In the International Law: GAUCI, Gotthard. **Oil Pollution At Sea. Civil Liability and Compensation for Damage.** New York: John Wiley $ Sons, 1997; INTERNATIONAL MARITIME ORGANIZATION – IMO. **Civil Liability for Oil Pollution Damage.** Texts of Conventions on Liability and Compensation for Oil Pollution Damage. London: IMO, 1996 and in the EU: KESSEDJIAN, Catherine et al. Le développement durable, quelles limites aux modes de transportation?. In: GRARD, Loïe (Dir.). **L'Europe des transports**, p. 709-748; VIALARD, Antoine. Responsabilité limitée et indemnisation illimitée en cas de pollution des mers par hydrocarbures. In: GRARD, Loïe (Dir.). **L'Europe des transports**, p. 749-766; GAUTIER, Marie. Quelles sanctions pénales à l'encontre des polluers des mers. In: GRARD, Loïe (Dir.). **L'Europe des transports**, p. 767-774; FARRE-MALAVAL, Margerie. Les nouvelles exigences communautaires relatives à la conception des pétroliers: la "Double-coque" imposée. In: GRARD, Loïe (Dir.). **L'Europe des transports**, p. 775-784.

effectiveness of the law to specific regulatory much? The search for the answer to this question will be based on the analysis of some trial the Federal Supreme Court and doctrine.

Thus, how has been the relationship between the Federal Brazilian Constitution and coding (Commercial Code, 1850 or the Brazilian Civil Code, 2002)? In order to contribute to this debate, this article aims, in brief notes, to discuss the constitutional foundations of the Regulatory Law that regulates waterway transportation and port activity.

At the same time, the objective is to discuss the possibilities of a hermeneutics and an argument that include their constitutionalization and dialog, a relationship of complementarity, not exclusion, between the Brazilian Federal Constitution and the various sources of Maritime Law and Port Law.

The theme, still unexplored in the Brazilian constitutional, maritime and port doctrines and, possibly, at the level of Comparative Law, is justified because the disciplines are dependent and vulnerable to a hermeneutic and argumentation in which in which a decline prevails, not to say, almost non-existent, effectiveness of the Brazilian Federal Constitution in matters pertaining to Maritime Law and Law Port. In this scenario, the relevant role of Regulatory Law stands out.

It should be mentioned that Maritime Law, which has a relevant source in the Brazilian Civil Code, despite the influence of the uses and customs (*Lex Maritima*) used uncritically and without proper observance of Constitutional Law and public order. Thus, it requires emancipation, at least from the point of view of the effectiveness of the Federal Constitution.

The same is true with the Port Law, which is strongly influenced by

by the transnational shipping company that operates vertically, since it can be a partner in the terminal.

It is believed, therefore, that the effectiveness of the Federal Brazilian Constitution may haver great contribution from independent sector regulation, through ANTAQ by increasing the constitutionalization of Maritime Law and Port Law.

It is therefore of Legal Policy (law as must-be) to be sought, [33] so that Brazil can better position themselves in front of supranational and transnational regulatory challenges that effective logistics demand and fair prices demands of Brazilian economic agents, which may provide greater legal certainty to the sector.

[33] Regarding the Legal Policy, especially given the Brazilian legislative chaos (Post Law), this discipline assumes, increasingly, relevance in the development of Law and institutions, it is worth highlighting the works of Prof. Dr. Osvaldo Ferreira de Mello (in memoriam , 2010), the Master's and PhD Program in Legal Science of Univali, which established in its program as a discipline required. The professor is possibly the most distinguished Brazilian legal scholar to research, teach and publish on the subject and, among his works, the following should be mentioned: MELO, Osvaldo Ferreira de. **Fundamentos da Política Jurídica.** Porto Alegre: Sérgio Fabris/CMCJ/Univali, 1994, 133 p; MELO, Osvaldo Ferreira de. **Temas Atuais de Política do Direito**. Porto Alegre: Sérgio Fabris/CMCJ, 1998, 88 p; Direção da Revista NEJ. A Contribuição de Osvaldo Ferreira de Melo para a Política Jurídica. **Novos Estudos Jurídicos**, Year IV, n. 7, 15 Oct. 1998, p. 11-15; MELO, Osvaldo Ferreira de. A Política Jurídica e os Novos Direitos. In: **Novos Estudos Jurídicos**, no. 6, mar. 1998, p. 9-13. Available at em:<www.univali.br/nej>. Accessed in: January 10th, 2019.

Furthermore, the Brazilian Maritime Law has been revigorating in force since the 1990s, through the works of Carlos Rubens Caminha Gomes, José Haroldo dos Anjos, [34] Carla Adriana Comitre Gibertoni, [35] Eliane M. Octaviano Martins [36] and Osvaldo Agripino de Castro Junior [37], its interpretation and application by national courts still seem far from a balance between the interests of the cargo and the carrier, especially the protection of the interests of the shippers of this mode of transportation.

Manuel Atienza, in this regard, draws attention to the relevance of creating a Law for the Latin world as follows:

> In particular, there is a serie of ideas that are found in the Marx´s thinking that are of great value to the building of a theory of Law in the Latin world in a perspective that we are defending here. Thus: the pragmatism (the primacy of the praxis); the functional perspective, critical and materialist of the social phenomenons; the proposal to consider the Law from a global conception of the society, that conduct to open the knowlegde to the social sciences; or the commitment to a political-ethical´s project to human emancipation that the Law could not be relegated.[38]

For the philosopher of the Spanish Law:

> (...) The philosophy of law shall fulfill a function of intermediation between legal knowledge and practices, on the one hand, and the rest of social practices and knowledge, on the other. (...) Since the practice of Law is very fundamental in arguing, there would be no reason why it would seem strange that legal scholars with some professional conscience should be curious about the issues addressed in this book. What does arguing mean legally? (...) 39 In short, what are the reasons for Law: not the reason for Law, but the legal reasons that serve as a justification for a particular decision? 40

Furthermore, it should be mentioned that this institutional environment is influenced by large portion of the Judiciary Power who have not understood, for example, the particularities of Maritime Law, when judging cases requiring an interpretation in the light of public order, it causes that the courts to use concepts such as uses and customs (*Lex Maritima*) to the detriment of Brazilian law.

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[34] DOS ANJOS, José Haroldo; CAMINHA GOMES, Carlos Rubens. **Curso de Direito Marítimo.** Rio de Janeiro: Renovar, 1992. This work is in the process of reviewing and updating by the co-author José Haroldo dos Anjos.

[35] GIBERTONI, Carla Adriana Comitre. **Teoria e Prática do Direito Marítimo.** Rio de Janeiro: Renovar, 1998.

[36] MARTINS, Eliane M. Octaviano. **Curso de Direito Marítimo.** vols. I (Teoria Geral); II (Vendas Marítimas) e III (Contratos e Processos). São Paulo: Manole, 2015.

[37] CASTRO JUNIOR, Osvaldo Agripino de (Org.). **Direito Marítimo Made in Brasil.** São Paulo: Aduaneiras, 2007; . **Direito Marítimo, Regulação e Desenvolvimento.** Belo Horizonte: Fórum, 2011; . **Direito Marítimo: Temas Atuais.** Belo Horizonte: Fórum, 2012;. **Direito, Regulação e Logística.** Belo Horizonte: Fórum, 2013; . **Marinha Mercante Brasileira –** Long haul, coastal and flags of (in)convenience. São Paulo: Aduaneiras, 2014; . **Contratos Marítimos e Portuários:** Civil Liability. São Paulo: Aduaneiras, 2015; ; MARTÍNEZ GUTIÉRREZ, Norman Augusto. **Limitação da Responsabilidade civil no transporte marítimo.** Rio de Janeiro: Renovar, 2016.

[38] In the original: “En particular, hay una serie de ideas que se encuentran en el pensamiento de Marx y que son de gran valor para la construcción de una teoría del Derecho para el mundo latino en el sentido que aquí se está defendiendo. Así: el pragmatismo (la primacía de la praxis); el enfoque funcional, crítico y materialista de los fenómenos sociales; la propuesta de considerar el Derecho a partir de una concepción global de la sociedad, lo que lleva a abrir los saberes jurídicos hacia las ciencias sociales; o el compromiso con un proyecto político- ético de emancipación humana en el que el Derecho no tendría por qué verse relegado”. ATIENZA, Manuel. **Una Filosofia del Derecho para el Mundo Latino.** Otra vuelta de tuerca, p. 13.

[39] ATIENZA, Manuel. **As Razões do Direito -** Teorias da Argumentação Jurídica - Perelman, Toulmin, MacCormick, Alexy e outros. 2. ed. São Paulo: Landy, 2002, p. 11.

[40] ATIENZA, Manuel. **As Razões do Direito -** Teorias da Argumentação Jurídica - Perelman, Toulmin, MacCormick, Alexy e outros, p. 12.

It should be noted also the existence of unfair terms in shipping contracts, so at odds with public order, [41] as it will be treated. In fact, the ambiguity of contemporary law is identified by Manuel Atienza as follows:

Thus, the legal philosophers that came from this tradition follow, in general, keeping two thesis that difficult or become imposible that the Law of the Constitutionals States may play this emancipatory game. Recognizing this function implies one idealization of the legal systems (including those from the Constitutional States). The Contemporary Law (that of the Constitutionals States) is, from a perspective political-moral, a phenomena essentially ambiguous, vinculated to all the dominant and also social emancipatory processes [42]

As Brazil does not have shipping companies in the international maritime transportation of goods and effective sectoral regulation by ANTAQ, but only shippers of shipping services, the prevailing doctrine of the Maritime Law that has been created by carriers. Thus, the shippers are vulnerable and dependent on the law created by the transporting countries, since they operate in a business environment with little legal certainty, partly caused by the strong influence of transnationality in international maritime transportation and the regulatory institutional weakness, which requires regulation independent sector.

This Maritime Law is distant from the national public interest and from independent sectoral regulation, as stipulated in art. 174, head provision of the article, of the Brazilian Federal Constitution, has caused negative externalities, given unfair terms, especially with regard to the courts, applicable law, exemption from civil liability and charges for container demurrage and extra-freight prices (*surcharges*).

When it comes to the sectoral regulation it is relevant judicial control over the actions of regulatory agencies, especially when it comes to constitutional value protection. The discussion between greater or lesser judicial deference in administrative acts is relevant, with Brazil, as well as France and Italy, with judicial control considered less deferent than the models of the United States and Canada.

The American experience contributes to the theory of constitutional fact. In this regard, the lesson of Eduardo Jordão applies:

> In the United States, courts have used the so-called “constitutional fact doctrine” for some time to determine the intensity of judicial control over a certain administrative decision. According to this

[41] As an example, it should be mentioned abuses committed by part of the shipowners and intermediaries in the judicial collection of container demurrage in violation of modicity and predictability. On the topic under our guidance: NOVAK FÓES, Gabrielle Thamis. **Comparative analysis of container demurrage in England and Brazil** - Critical to Amendments 56 and 215 of the Bill No. 1572/2011. Master's Dissertation in Legal Science. Univali: Itajaí, 2015, 186 p. e CASTRO JUNIOR, Osvaldo Agripino de. (Org.). **Teoria e Prática da demurrage de contêiner.** São Paulo: Aduaneiras, 2018, 392 p.

[42] In the original: “Sin embargo, los iusfilósofos que vienen de esa tradición siguen, por lo general, manteniendo dos tesis que dificultan o hacen imposible que el Derecho de los Estados constitucionales pueda jugar ese papel emancipatorio. Reconocer esta función, por cierto, no implica una idealización de los sistemas jurídicos (incluidos los del Estado constitucional). El Derecho contemporáneo (el de los Estados constitucionales) es, desde el punto de vista político- moral, un fenómeno esencialmente ambiguo, necesariamente vinculado con todos los procesos tanto de dominación como de emancipación social”. ATIENZA, Manuel. **Una Filosofia del Derecho para el Mundo Latino.** Otra vuelta de tuerca, p. 13.

> theory, the court responsible for the division shall use a control "again" and independent of all constitutional question relating to an action of agencies. In the Crowell case [43], the American Supreme Court extrapolated the constitutional fact theory to reach the "jurisdictional fact doctrine too. It considered that the courts shall independently determine the aspects of the decision related to the jurisdiction of the administrative entity.[44]

Regarding the Port Law, it is distant from the effects of the constitutional economic order, regarding the modicity in the prices and port tariffs and protection of competition under the guise of the rhetoric of the illegality of regulation based on free enterprise, by a portion of service providers.

It should be noted that the principle of free enterprise is not able, per se, to exclude the impact of State intervention in the economic domain and the principle of consumer protection. On the subject, the Federal Supreme Court has already expressed as follows:

> The principle of free enterprise cannot be invoked to exclude the rules of market regulation and consumer protection. (Special Appeal [RE] 349.686, Judge-Rapporteur, Min. Ellen Gracie, trial on 6/14/2005, Second Panel, DJ dated 5/8/2005.) In the same sense: AI 636.883-AgR, Judge-Rapporteur, Min. Cármen Lúcia, trial on 2/8/2011, First Panel, DJE dated 3/1/2011) State intervention in the economy through rulemaking and regulation of economic sectors, is made with respect to the principles and foundations of the economic order. Brazilian Federal Constitution, art. 170. The principle of free enterprise is the foundation of the Brazilian Republic and the Economic Order: Brazilian Federal Constitution, art. 1, IV; art. 170. Price fixing below values and in disagreement with the legislation applicable to the sector: an obstacle to the free exercise of economic activity, with disrespect to the principle of free enterprise. (Special Appeal 422.941, Judge-Rapporteur, Min. Carlos Velloso, trial on 12/5/2005, Second Panel, DJ dated 3/24/2006) In the same sense: AI 683.098-AgR, Judge-Rapporteur, Min. Ellen Gracie, trial on 6/1/2010, Second Panel, DJE dated 6/25/2010.
>
> It is true that the economic order in the Brazilian Federal Constitution/1988 defines option for a system in which plays a key role to free enterprise. *This circumstance does not justify, however, the assertion that the State will only intervene in the economy in exceptional situations.* More than a mere instrument of government, our Brazilian Federal Constitution sets out guidelines, programs and purposes to be carried out by the State and society. It postulates a normative global action plan for the State and for society, informed by the precepts conveyed by its arts. 1, 3, and 170. Free enterprise is an entitled expression of freedom not only for the company but also for the work. That is why the Brazilian Federal Constitution, when including it, also considers the 'State's Enterprise'; therefore, it does not privilege it as a pertinent asset only to the company. (...)(ADI 1.950, Judge-Rapporteur. Min. Eros Grau, trial on 11/3/2005, Full Court, DJ dated 6/2/2006) In the same sense: ADI 3.512, Judge-Rapporteur. Min. Eros Grau, trial on 2/15/20065, Full Court, DJ dated 6/23/2006.

After all, the market is not a product of nature and can be legally created for a socially fair purpose. There is, therefore, opposition between regulation and market as Cass Sustein teaches:

> What is then the relationship between free markets and social justice? To answer this question, we should recognize that markets, free or not, are not a product of nature. In contrast, markets are instruments built legally, created by human beings who intend to produce a successful system of social order. So, as I have emphasized, there is no opposition between 'markets' and 'government intervention.' Markets are (a particular form of) government intervention. Thus, the interactions promoted by markets include coercion as well as voluntary choice. Rarely markets shall be identified with freedom. The right to property, for example, coerces people who want access to things it did

[43] Crowell versus Benson, 285 U.S. 22 (1932). In this particular case, it was a matter of independently evaluating whether a damage occurred in the navigable waters of the United States, when the competence (jurisdiction) of the agency responsible for establishing the compensation depends on this fact.

[44] JORDÃO, Eduardo. **Controle judicial de uma administração pública complexa –** A experiência estrangeira na adaptação da intensidade do Controle. São Paulo: Malheiros, 2016, p. 69.

> not have. As how?'all instruments, the markets should be analyzed by asking whether they promote our social and economic goals. [45]

As seen, there are many constitutional foundations of regulatory law applied to water transportation and port activity, which requires doctrine production (Law) to provide adequate service on the one hand, and fair compensation to the service provider, on the other hand, striking a balance of the interests, without which there is no effective public interest.

CONCLUSIONS

The arguments in Maritime Law and Port Law need an adequate understanding of the regulatory phenomenon that has constitutional foundations for independent sectoral regulation, aiming at legal security, the defense of competition and the defense of the shipper.

Thus, the constitutionalization of Maritime Law and Brazilian Port Law, strategic disciplines for the development of Brazil, has the possibility of greater efficiency through the independent sector regulation (Art. 174, head provision of article of the Brazilian Federal Constitution), especially as its subject matter, the ship and its contractual legal relations, for example, shipping contract, as well as port operations with the cargo or passengers carried by the vessel shall undergo a regulation through ANTAQ.

Here, therefore, one needs a hermeneutic challenge because there is no way to insist on the application of the single private legal regime for maritime and port contracts, although based on the Brazilian Civil Code, the Commercial Code and the Port Act, especially since the Law is one, which has the Brazilian Federal Constitution as its foundation and origin. After all, the Maritime Law and Law Port can not be indifferent to the Constitutional Law, the Administrative Law and Regulatory Law of water transportation and port activity.

It is therefore the interpreter shall modulate the institutes of the Maritime Law and Law Port, especially their contracts in the light of Constitutional Law. The sector regulation presupposes balance, so that there is only a legal regime of Administrative Law depending on the matter, but a relationship of publicization of Private Law and, in turn, of Maritime Law and Port Law, and not the other way around, that is, the privatization of Constitutional Law in its aspect of Regulatory Law.

There is no way to defend, therefore, that a branch of law is private, because with the granting of the Brazilian Federal Constitution, which was private, became public-private. With the

[45] "What, then, is the relationship between free markets and social justice? In answering that question, we should recognize that markets, free or otherwise, are not a product of nature. On the contrary, markets are legally constructed instruments, created by human beings hoping to produce a successful system of social ordering. As I have emphasized throughout, there is no opposition between ´markets´ and ´government intervention´. Markets are (a particular form of) government intervention. Hence the interactions promoted by markets include coercion as well as voluntary choice. Markets should hardly be identified with freedom. The law of property, for example, coerces people who want access to things that they do not own. And like all instruments, markets should be evaluated by asking whether they promote our social and economic goals." SUNSTEIN, Cass R. **Free Markets and Social Justice.** Oxford University Press: Oxford, New York, 1999, p. 384.

independent sector regulation, these rights become public in nature and and are derogations from Law.

Private, such as the right to property, which shall observe the social function of property; and the contract, which shall observe the social function of the contract (transportation), as determined by the Brazilian Federal Constitution.

The interpretation shall be systematic, based on the Brazilian Federal Constitution, because the right is not a bunch of rules.

Under the Private Law and, especially, the need for a dialog between sources of private law and public law, so that the former does not override the latter, public order assumes relevance, especially in conflicts with parts of different nationalities, as is common in international maritime transportation.

In this scenario, Regulatory Law is relevant to strike a balance of the interests of the cargo (shipper) and the maritime carrier, as well as the shipper and port terminals, strong in the constitutional principles of sovereignty and the social function of transportation contracts in the light of arts. 170, 174, head provision and 178, head provision and Commercial Code and Civil Code and the Civil Procedure Code, especially given the unfair contract terms that such standardized transportation contracts (adhesion) contain, with serious damage to the Brazilian shippers without complying with constitutional provisions.

Thus, it is concluded with the perception that the search for the effectiveness of the Brazilian Federal Constitution, through its economic order, especially the articles mentioned above, to be implemented by ANTAQ, can greatly contribute to the effectiveness of the appropriate service in the maritime and port transportation sector.

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REGULATION AND REASONABLE PRICES IN BRAZILIAN´S SHIPPING AND PORT SECTORS

Osvaldo Agripino de Castro Junior[1]

INTRODUCTION

This article is linked to the Line of Research in *Constitutionalism and Production of Law*, of the Program of Master's Degree and Doctorate in Legal Science of the University of Itajaí Valley, especially to the Research Group in *State, Constitutionalism and Production of Law.*

The lack of appropriate regulation in the prices and tariffs of the sector of waterway transportation and ports, the duty of the Brazilian´s National Waterway Transportation Agency (Antaq), by the nonexistence of limits to prices and tariffs when clearly excessive has not provided an appropriate service. This is a worldwide´s problem that reduces the competitiveness of the goods, burdening specially the developing countries like Brazil.

In this respect, in order to contribute to the effectiveness of the appropriate service, especially of articles 170, V; art. 174 and 175, sole paragraph, subsection IV, of the Brazíl´s Federal Constitution, this article maintains that a technical discussion is required which provides the limitation of the prices collected (price cap) by the contractors, seaport and inland port terminals, intermediary agents and maritime carriers, when such amounts are clearly excessive, i.e., infringe moderation. There is no similarity with price setting.

In waterway transportation and port activity, sector regulated by Antaq, State agency created by Law 10.233/2001, it is no different, especially by the existing network industry and with a strong degree of transnationality, intermediary agents and verticalization (partner shipowners of port terminals), on one hand, and ineffective economic regulation, on the other hand.

For such reasons there is nonexistence of moderation, characterized by adopting prices on a fair and reasonable basis, which has allowed abuse, as the policy of the agency is not imposing a limit, but determining reports when there is abuse, heightened by the lack of a policy defending competition by the sectoral regulating agency (Antaq).

In this context, the article intends to contribute to the effectiveness of moderation in waterway transportation and port activity, bearing in mind that the agency Antaq has refused to resolve the problem through creating objective criteria to limit prices, when clearly excessive. It is sustained that moderation is the condition required, although it is not sufficient for appropriate service.

[1] PhD in Law (Federal University of Santa Catarina, UFSC, 2001). Concluded the Post-Doctoral Studies at the Center for Business and Government, Kennedy School of Government, Harvard University, 2007-2009, sponsored by Brazilian Federal Government (CAPES). Professor at the LLM and PhD Law Program at the University of the Vale of Itajaí, UNIVALI, Brazil. E-mail: agripino@univali.br

To attain its scope, the article is divided into two parts. Part 1 deals with the constitutional foundation of transportation and relevant concepts, based on standards of Antaq. Part 2 discusses moderation and appropriate service in the standards of Antaq, through analyzing two cases, when there are clearly excessive amounts. At the end there are final considerations with suggestions for providing the appropriate service with greater effectiveness.

Few authors in Brazil have written about reasonable prices on the shipping and ports sectors[2] [3]. In the comparative law, it is important mention the research of Trujillo and Nombela[4].

The problem is the lack of appropriate service, specially reasonable prices on the Brazilian shipping and port sectors.

As the companies in this sector operate in a network industry, with a strong degree of transnationality, intermediary agents and verticalization (shipowners are partners of the port terminals), there is nonexistence of moderation, characterized by adopting prices on a fair and reasonable basis, which has allowed abuse, as the policy of the agency is not imposing a limit, but determining reports when there is abuse, heightened by the lack of a policy defending competition by the sectoral regulating agency (Antaq).

In order to reduce this problem, the article uses a constitutional-regulatory approach through the critical analysis of the regulations of the sector and some cases and suggests price limit on the prices of the sector, as demurrage of containers and port services.

The methodology is based on the role of the economic regulation to increase the effectiveness of the economic constitutional order on the regulations of the shipping and port sectors.

1. RELEVANT CONCEPTS AND CONSTITUTIONAL FOUNDATIONS OF TRANSPORTATION

Transportation is a strategic element for developing the economy of any country, especially in countries of continental size such as Russia, the USA, Canada and Brazil. It is emphasized that the derived constituent listed transportation as a social right, as per art. 6. of the Federal Constitution, included by Constitutional Amendment 90/2015:

> Art. 6 Social rights are education, health, food, work, residence, transportation, leisure, security, social security, protection for maternity and infancy, assistance for the helpless, in the form of this Constitution.

Notwithstanding such category being a social right with constitutional forecast, Brazilian transportation requires greater efficacy of the appropriate service, partly caused by the

[2] CASTRO JUNIOR, Osvaldo Agripino de; RODRIGUES, Maicon. **Direito Portuário: Modicidade, Previsibilidade e Defesa da Concorrência.** Florianópolis: Conceito, 2019, 247 p.

[3] CASTRO JUNIOR, Osvaldo Agripino de. **Direito Portuário e a Nova Regulação.** 2ª. ed. São Paulo: Aduaneiras, 2019, 536 p.

[4] TRUJILLO, Lourdes; NOMBELA, Lourdes. Puertos. **In:** ESTACHE, Antonio; DE RUS, Ginés (eds.). **Privatización y Regulación de Infraestructuras de Transportes – Una Guía para reguladores.** Washington: Banco Mundial, Alfaomega, 2003, p.113-172.

nonexistence of State policies which provide the conditions of efficiency, foreseeability, moderation, regularity, sustainability and punctuality.

1.1 Relevant concepts

1.1.1 Transport contract

To deal with moderation in transportation it is necessary to define what a transport contract is. According to art. 730 of the Brazil´s Civil Code: "*By the transport contract someone undertakes, through retribution, to transport, from one place to another, people or things*."

Indeed, as per art. 731 of the Civil Code, transportation in Brazil can only be exercised through granting of authorization, permission or concession and is ruled by regulatory standards and that which is established in those acts, without loss of that set forth in the aforesaid Code.

It is sustained that the lack of regulation of the foreign maritime transporter, especially that of container, by means of granting authorization, is one of the causes of lack of dissuasive power of Antaq and, in turn, of the infringement of moderation.

1.1.2 Moderation

Conceptualizing moderation in waterway transportation is relevant to establishing fair and appropriate prices for its purpose and, also, contributing to the universality of the service, as immoderate prices restrain or prevent access of the user to the service. In the maritime transportation sector, this principle is one of the most relevant ones for the competitiveness of Brazilian products.

In this respect, concerning the concept of moderation of Normative Resolution 18/2017, enacted by Antaq, which deals with the rights and duties of users, intermediary agents and the maritime transporter, in the terms of its art. 3, subsection VII, it is relevant, although not sufficient to impose limits:

> Art. 3 The maritime transporters of long distance and coasting and the intermediary agents shall observe permanently, as relevant, the following conditions for rendering appropriate service:
>
> (...)
>
> VII - moderation, characterized by adopting prices, freight, rates and surcharges with a fair basis, transparent and not discriminating and which reflect the balance between the costs of rendering the services and the benefits offered to the users, allowing the improvement and expansion of the services, besides appropriate remuneration; and

The lack of a conceptual definition of moderation in prices and tariffs and the multidisciplinarity of public services (dealers and authorizing bodies) and public interest (authorization), also liable to intense state regulation, lead to diversity of tariffs and prices collected privately and difficulty of state control, by sectoral regulation, aiming at balance on the composition of costs.

To avoid this problem, which allows abuse of the lessee or dealer, it is necessary to validate the readjust of tariff by act of State, *in casu,* Antaq, in the terms of art. 27, subsection VIII, of Law 10.233/2001.

In this environment, the Brazilian doctrine has suggested solutions for effectiveness of tariff moderation, as expressed by Egon Bockman Moreira:

> Once this premise has been established, the most important action is the constant search for excellent results. Within this set of data, the tariff shall be as moderate as possible related to the service to be administered and rendered by the dealer. In the case of common concessions ruled by the General Law of Concessions, moderate is the tariff which is in the measure to make the project self-sustaining - no more or less than that strictly necessary for the service to be appropriate to the respective social requirements. Thus the need for constant attention to the economic-financial balance of the contract (for more or for less), stamped in its periodical reviews - which are one of the most efficient ways of ensuring moderation.[5]

When dealing with moderation in the port sector, Osvaldo Agripino de Castro Junior and Maicon Rodrigues[6] sustain that despite the range of concepts of moderation of tariffs and prices, the subject is still little disclosed and applied in the scope of ports. Thus, a juridicity which handles an appropriate interpretation that aims at effectiveness of moderation is relevant. This ends up being little applied in the daily life of port operations, like a normative adornment, leaving the standard complete, but not efficacious.

Concerning moderation of prices in the maritime transportation sector, there is a normative forecast in Law 10.233/2001, which sets forth about the objectives of Antaq in regulating waterway transportation and port activity, in the following way:

> Art. 20. The objectives of the National Agencies of Regulation of Land and Waterway Transportation are: (...) a) ensure the movement of people and goods, in fulfilling standards of efficiency, safety, comfort, regularity, punctuality and *moderation in freight and tariffs*;

Likewise, Law 8.987/1995, which sets forth about the granting and permission of public services, stresses the importance of tariff moderation, including in the development of other sources arising which lead to modest tariffs for the user:

> Art. 11. In handling the particularities of each public service, the granting power shall be able to foresee, in favor of the dealer, in the bid notice, the possibility of other sources arising from alternative, complementary, accessory revenues or those from associated projects, with or without exclusiveness, with a view to favoring moderate tariffs, observing that set forth in art. 17 of this Law.

Finally, it should be emphasized that the lessee needs to implement an economic activity, so that the State allows the production of riches, provided that several principles are observed, including moderate tariff and foreseeability.

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[5]MOREIRA, Egon Bockmann. **Direito das Concessões de Serviço Público** - Inteligência da Lei n. 8.987/1995 (Parte Geral). São Paulo: Malheiros, 2010, p. 263.

[6]CASTRO JUNIOR, Osvaldo Agripino de; RODRIGUES, Maicon. **Direito Portuário: Modicidade, Previsibilidade e Defesa da Concorrência.** Florianópolis: Conceito, 2019, p. 231-232.

In this environment, moderation also applies to all the services authorized or of public interest, even though not authorized, such as the one which involve maritime transportation and its accessories, such as the use of the container.

1.1.3 Free initiative, free competition and the defense of the consumer/user

The constitutional principles are the pillars of legal order, and are consecrated in the Federal Constitution of 1988 as general principles of economic activity, free initiative, free competition and defense of the consumer, which appear in art. 1, IV and art. 170.

Free initiative, consecrated as one of the foundations of the Federative Republic of Brazil by the originating constituent, covers both the freedom of exercise of any economic activity, without the interference of the State, except due to the law, and the freedom of contracting, which involves the rights of negotiation and establishing contents of the contract according to the interest and convenience of the parties.

It is stressed that such freedom is not absolute, unrestricted, because there is an obstacle in the regulation of the State, especially the economic sectoral regulation of the regulating agencies.

In turn, free competition is related to free initiative, and is based upon the assumption that competition cannot be restrained by economic agents with greater power in the market. Thus, the establishment of goods and services must not arise from cogent acts of the administrative authority, but from the free play of forces in customer dispute or, in the case of values clearly excessive, from limitation by the State.

This occurs so that the principle of defense of the consumer/user of the service is executed, as the principles in a system cannot be interpreted separately, but in a systematic way, always observing the public interest, which takes place in executing the appropriate service, by means of condition of moderation in prices and tariffs.

1.1.4 Defense of the user (shipper)

The user has public subjective right in rendering service, which must be furthered in an appropriate way. Not placed only as a mere conceptual adornment, this right can be required to be fulfilled, as the user is the essential piece for maintaining the service and the purpose of the public service is to honor the user.

In spite of the maritime transportation service not being public, because it is rendered by authorization holder, in the case of Brazilian navigation companies, which operate through granting of authorization, ironically the foreign maritime transporter operates without granting.

We know that authorized service is not public service, but is of public interest, therefore, it undergoes economic regulation, albeit at a regulatory density differing from that of granting or permission, but never less. That is why the theory of defense of the user of public service is

relevant to the problem of maritime transportation which does not observe the appropriate service.

The rights of the users must be defended as well as being able to be imposed legally, and their defense is the duty of the grantor and sectoral regulating body.

There is a problem of asymmetry of representation in the maritime transportation sector, when dealing with the organization of the user related to that of the intermediary agent and of the transporter. This problem contributes to the asymmetry of information and, in turn, production of standards which allow greater balance between user and transportation contractor.

Concerning this problem, it is important to mention the doctrine of Trujillo and Nombela:

> There is, by assumption, a conflict generated by the asymmetry in information, given that the private operator is encouraged to hide information relevant to the regulator. This aspect can be softened through periodic control which allows a continuous monitoring and through establishing reasonable standard service levels.[7]

The problem of lack of economic regulation, with record and monitoring of prices collected by the private companies in the sector, in this case, by lack of appropriate regulation of Antaq, contributes to increasing the problem, with the rejection of the contractors not presenting the receipt of payments and, thus, configuring compensation.

In the case of the collection of Terminal Handling Charge (THC) made by the maritime carrier or its intermediary agent, we are faced with opportunist conduct, typical of free rider, as such companies “hitch a lift” on the right of the port terminal, which should charge the service directly. Concerning this problem, and how to overcome it, by means of confirmation of the amount effectively paid through the regulator (disclosure regulation), in the words of Anthony Ogus, professor emeritus of the University of Manchester:

> There is presumably a considerable consumer demand for intermediaries to provide independent, reliable comparisons on the prices and quality offered by different traders and yet, because of the 'free-rider' problem, there is likely to be, in the unregulated market, an under-supply of such intermediaries. Government may then fund a public agency, or subsidize a private agency, to provide such information. Alternatively, it can establish a system of public registration or certification of traders who satisfy certain minimum standards of quality. Such a system is to be distinguished from a licensing regime which prohibits those without a license from practicing the trade or profession. Registration or certification does not control conduct; it simply provides information. Like disclosure regulation, it preserves consumer choice.[8]

It deals with a failure of information in the regulation, which has been allowed by Antaq since the edition of Resolution 2.389/2012, so that in the words of Ogus, regarding the duty of informing the price and controlling (and punishing) the false or erroneous information as follows:

> Information regulation falls into two broad categories: mandatory disclosure, which obliges suppliers to provide information relating to price, identity, composition, quantity, or quality; and the control of

[7] TRUJILLO, Lourdes; NOMBELA, Lourdes. Puertos. **In:** ESTACHE, Antonio; DE RUS, Ginés (eds.). **Privatización y Regulación de Infraestructuras de Transportes – Una Guía para reguladores.** Washington: Banco Mundial, Alfaomega, 2003, p.113-172.

[8] OGUS, Anthony. **Regulation – Legal Form and Economic Theory.** Oxford, Oregon: Hart, 2000, p. 121.

> false or misleading information. The discussion is divided accordingly. First, however, we must consider the theoretical justifications for information regulation.[9]

This lack of information leads to negative externality, in this case, enriching without cause, because the contractor refuses to provide the receipt of compensation even to the regulator, even though urged to by the regulator, in order to reduce the user's loss, all to increase exponentially the profit of the one retaining the information, well above the marginal cost of the service, also in the words of professor Ogus:

> Mandatory disclosure regulation can generate direct welfare gains for consumers whose purchase of goods or services is affected by inadequate information. If the unregulated market does not lead to what we have referred to as the 'optimal' amount of information, that is where the marginal benefit arising from that amount of information is approximately equal to the marginal cost of producing and communicating it, consumers sustain a welfare loss: the difference between the utility derived from the transaction without the optimal amount of information and the utility they would have derived if that amount of information had been supplied. Forcing the seller to supply that amount of information may eliminate the loss.[10]

The subject of social regulation of information is so relevant that it has deserved specialized attention of the doctrine compared many years ago, especially regarding the duty of revealing prices and control in cases of erroneous information as can be seen in the case concerned.

This arises from the greater organization of the contractors which, in turn, causes negative externalities in normative production (the standard is edited to benefit the contractor) and in the control. This environment generates predatory prices, which require efficacious regulatory performance by Antaq, as can be seen in the port sector:

> Although Antaq has been created to develop waterway transportation, with the application of Law 9.432/1997 (orders waterway transportation in the terms of art. 178 of CF/88), and port activity, of which the main standard was the Law of Ports (8.630/1993) and, as of June 5, 2013, by means of Law 12.815/2013 (New Law of Ports), the users have not yet developed the consequences of Antaq, to defend their interests, as opposed to EBNs and terminals, which are better organized, generating asymmetry of representativeness between terminals and users.
>
> Furthermore, it should be mentioned that the port sector was a state monopoly and, with the reform of Law 8.630/1993, with more than 2/3 of the cargo moved in private terminals and ineffective regulation, which allows predatory prices by the terminals, as it deals with a network industry.[11]

However, the edition of RN 18/2017, by Antaq, which sets forth about the rights and duties of users and the other contractors of the sector is emphasized, as follows:

> Art. 1 The present Standard sets forth about the rights and duties of the users, the intermediary agents and the companies which operate in maritime support navigation, port support, coasting and long distance, and establishes administrate offenses.
>
> Sole paragraph. This standard does not apply to organized ports, port installations, terminals of private use, cargo transfer stations, public port installations of small size, port installations of tourism and installations of support for waterway transportation.

[9] OGUS, Anthony. **Regulation – Legal Form and Economic Theory.** Oxford, Oregon: Hart, 2000, p. 121.

[10] OGUS, Anthony. **Regulation – Legal Form and Economic Theory.** Oxford, Oregon: Hart, 2000, p. 121.

[11] CASTRO JUNIOR, Osvaldo Agripino de. **Direito Portuário e a Nova Regulação**. 2ª ed. São Paulo: Aduaneiras, 2019, p. 112.

(...)

Art. 8 Basic rights of the user, without loss of others established in specific legislation and in the contract, are as follows:

I - receive appropriate service observing the standards of regularity, continuity, efficiency, safety, updating, generality, punctuality and moderation;

II - indicate to ANTAQ the irregularities and offenses of the law and regulations which (s)he is aware of, referring to the service rendered, operation or availability contracted;

III - have available transparent, correct and precise information by means of accessible communication channels, with prior knowledge of all the services, operations or availability to be contracted and the risks involved, including the specification of the amounts of the prices, freight, rates and surcharges, deceitful advertising banned; and

IV - obtain and use the service with freedom of choice of contractors, coercive or unfair commercial methods banned, as well as practices and clauses in noncompliance with the law, standards, regulations or international agreements, conventions and treaties ratified by Brazil or imposed in the supply of services.

There is also mentioned the right the user has regarding defense of competition, especially related to maritime transporters and intermediary agents, which must abstain from practices harmful to the economic order, including related to arbitrary increase of profit arising from, for example, demurrage of container, in the terms of art. 5, of RN 18/2017:

Art. 5 The maritime transporters and intermediary agents shall abstain from practices harmful to the economic order by means of acts, however expressed, regardless of fault, which have as aim or that may produce effects, albeit not yet attained, of limiting, falsifying or in any way harming free competition or free initiative, increasing profit arbitrarily, or exercising a dominating position in an abusive way.

1.1.5. Duties of the users

When it deals with balance between the rights of the users and of the maritime transporter and/or its intermediary agent, it is relevant to handle the duties of users as set forth in art. 9 of RN 18/2017, Antaq, below:

Art. 9 The user's duties, without loss of others established in specific legislation and in the contract, and also, as relevant, to the type of navigation executed, are to:

I - pay the amounts referring to the services, operations and availability contracted;

II - only contract waterway transportation or operations and availability in navigation of maritime support, port support or coasting with a navigation company duly e authorized by Antaq to execute the service intended and, in long-distance navigation, in compliance with Law 9.432, of 1997, and the treaties, conventions, agreements and other international instruments ratified by Brazil;

III - contribute to the duration of the good condition of public or private assets by means of which the services are rendered;

IV - deliver or remove the cargo at the place and term agreed upon for shipment or unloading with the correct packing, in compliance with the laws, regulations, technical requirements applicable and the treaties, conventions, agreements and other international instruments ratified by Brazil;

V - provide correct, clear, precise, timely and complete information:

a) for the coastal and long-distance navigation operations, about the cargo to be transported, especially the requirements for compliance with the standards and regulations of the governmental bodies and the treaties, conventions, agreements and other international instruments ratified by Brazil; and

b) for the navigation operations of port or maritime support, concerning the procedures to be adopted, considering the specificities of the respective operations; and

VI - serve, in the scope of their assignments and in the term stipulated, the maritime transporter, the intermediary agent, Brazilian shipping company, port or maritime support or the relevant authorities, providing them with all the documents and information required concerning their hazardous products and services subject to specific regulations by another body.

1.2 Constitutional Foundations

In this scenario it is relevant to point out that the word "transport" is mentioned more than 25 times in the Federal Constitution, it being the duty of the municipality to organize and render, directly or through a system of granting or permission, the public services of local interest, including collective transportation, which are of an essential nature, asper subsection V of art. 30.

Maritime transportation of crude oil of national origin or basic derivatives of petroleum produced in Brazil, as well as the transportation by means of conduit, of crude oil, its derivatives and natural gas of any origin, is the monopoly of the Union in the terms of art. 177, subsection IV.

In turn, art. 178 sets forth concerning the ordering of the various modes:

Art. 178. The law shall set forth concerning the ordering of air, water and land transportation, having, regarding the ordering of international transportation, to observe the agreements signed by the Union, attending to the principle of reciprocity. (Wording given by Constitutional Amendment 7, of 1995)

Sole paragraph. In the ordering of aquatic transportation, the law shall establish the conditions in which the transportation of goods of coasting and inland navigation shall be able to be executed by foreign ships.

Furthermore, article 21 deals with the competences of the Union regarding transportation, in the following way:

Art. 21. It is the duty of the Union: (...) XII - to develop, directly or through authorization, granting or permission: (...) c) air and aerospace navigation and the airport infrastructure; d) the services of railroad and waterway transportation between Brazilian ports and national frontiers, or which transpose the limits of State or Territory; e) the services of interstate and international road transportation of passengers;

It should be pointed out that art. 175 deals with public services, as well as the necessity of preserving users' rights, the tariff policy and the obligation of maintaining an appropriate service, in the following way:

Art. 175. It is the duty of the Public Power, pursuant to the law, directly or through authorization granting or permission, always through bidding, to render public services. Sole paragraph. The law shall set forth concerning: I - the system of companies with granting and permission for public services, the special nature of the contract and its extension, as well as the conditions of lapse, control and termination of the granting or permission; II - the users' rights; III - tariff policy; IV - the obligation of maintaining an appropriate service.

Despite this constitutional framework which deals with transportation, there is a lack of effectiveness related to waterway transportation and the port activity, especially regarding abusive prices, which infringe moderation, where the Law of Antaq, (Law 10.233/2001) sets forth the objectives of regulation in the sector of waterway transportation and ports, in the terms of subparagraph a, subsection II, art. 20, transcribed above.

After the presentation of relevant concepts and constitutional foundations of transportation, the theme of appropriate service, emphasizing moderation, will be dealt with in the next part.

2. MODERATION AS A CONDITION OF APPROPRIATE SERVICE IN WATERWAY TRANSPORTATION AND PORT ACTIVITY

2.1. Introduction to the standards which regulate appropriate service

The two main standards which deal with users' rights in waterway transportation and port activity are RN 18/2017, of Antaq, aforementioned and Resolution 3.274, of February 6, de 2014, amended by Normative Resolution 02-Antaq, of February 13, 2015 and Rectified by Normative Resolution 15-Antaq, of December 26, 2016), which approves the standard that sets forth concerning the control of rendering of a port services and establishes administrative offenses.

2.2 In waterway transportation

As already mentioned, Normative Resolution 18-Antaq is the one which deals with the concept of appropriate service, including moderation. It approves the standard which sets forth concerning rights and duties of users, intermediary agents and companies which operate in navigation of maritime and port support, coasting and long-distance, and establishes administrative offenses.

In this scenario, in Chapter III, it deals with appropriate service and in subsection VII of art. 3, it establishes moderation as one of the conditions of maritime transporters of long-distance and coasting and the intermediary agents as follows:

> Art. 3 The maritime transporters of long-distance and coasting and the intermediary agents shall observe permanently, as relevant, the following conditions for rendering an appropriate service: (...) VII - moderation, characterized by adopting prices, freight, rates and surcharges on as fair, transparent and non-discriminatory basis which reflects the balance between the costs of rendering services and the benefits offered to the users, allowing the improvement and expansion of the services, besides appropriate remuneration; and

Also, being relevant to costs in waterway transportation, it should be noted that, besides the aforesaid condition of moderation, the concept of appropriate service set forth in RN 18/2017, applied to maritime transporters and intermediary agents, stipulated several other conditions, beginning with regularity, in the aforesaid articles, as follows:

> Art. 3 The maritime transporters of long-distance and coasting and the intermediary agents shall observe permanently, as relevant, the following conditions for rendering an appropriate service:
>
> I - regularity, by means of execution of frequency and scales offered to the users;

III - efficiency, by means of:

a) fulfillment of the parameters of performance established contractually, seeking the best result possible and continuous improvement of quality and productivity;

b) adopting operational procedures which avoid loss, damage, misplacement of cargos or waste of any nature, due to lack of method or rationalization in their performance, minimizing costs to be borne by users; and

c) diligent execution of their operational activities, so as not to interfere and minimize possible damage or delays in the activities executed by third parties;

IV - safety, characterized by fulfillment of practices recommended of safety of waterway traffic, aiming at conserving the environment and the physical and proprietary integrity of the users, the cargo and the port installations used, as well as any other resolutions, standards and regulations related to safety issued by competent authorities or by international agreements, treaties, conventions and treaties, of maritime transportation ratified by Brazil;

(...)

VI - generality, ensuring the offer of services, in an isonomic and non-discriminatory way to all the users, as widely as possible;

(...)

VIII - punctuality, through fulfillment of terms, established or estimated, for rendering services, established in contract, formally scheduled between the parties involved or reasonably demanded, taking into consideration the circumstances of the case.

The aforesaid concept of moderation is almost the same as that which must be observed by Brazilian navigation companies which operate in maritime support (off-shore industry) and port support (tugs and launches), as per subsection VII of art. 6:

> Art. 6 Brazilian´s shipping company and port support shall observe permanently, as relevant, the following conditions for rendering service, operation or availability contracted, in an appropriate way: (...) VII - moderation, characterized by adopting prices, freight, rates and surcharges on as fair, transparent and non-discriminatory basis which reflects the balance between the costs of rendering services and the benefits offered to the users, allowing the improvement and expansion of the services, besides appropriate remuneration; and

It is also stressed that appropriate service, which includes the standard of moderation is one of the user's basic rights, in the terms of subsection I, of art. 8, which is:

> Art. 8 Basic rights of the user, without loss of others established in specific legislation and the contract, are to:
> I - receive appropriate service observing the standards of regularity, continuity, efficiency, safety, updating, generality, punctuality and moderation;

It is relevant to mention that, at the same time that there is a standard which includes as administrative offense noncompliance with the criteria of appropriate service described in RN 18/2017, Antaq is incapable of limiting, for example, the price of demurrage of container, as well as port storing, when it is abusive. Let us see article 27, subsection II, which deals with the aforesaid sanction:

> Art. 27. Administrative offenses of a medium nature are constituted of:
> (...)

> II - not fulfilling the criteria of appropriate service described in this Standard, except when the offending conduct fit in the specific type handled in this Standard: fine of up to R$ 100,000.00 (one hundred thousand reals);

2.2.1. CASE STUDY: THE COLLECTION OF DEMURRAGE IN IMMODERATE AMOUNT

If there is collection of amount of demurrage of up to eighty times the value of the freight and thirty times the value of the cargo, obviously there is infringement of moderation and, therefore, of appropriate service condition. In this case it is indispensable to establish limits for immoderate tariffs or prices, under penalty of making appropriate service unfeasible.

In this scenario, it is relevant to mention the case in which Antaq decided not to face the problem of da effective moderation for demurrage of container, because urging the creation of criteria to limit such collection would have entailed technical studies discussed in public hearing to define objectives, and Antaq, in the report of the Director Francisval Mendes, resolved to reject the request for amendment of RN 18/2017 to impose such criteria.

The case refers to a judicial proceeding of collection of demurrage of three dry containers, in the amount of R$ 1,113,446.73 (one million, one hundred and thirteen thousand, four hundred and forty-six Brazilian reais and seventy-three cents), on January 31, 2018, including fees of winner's legal costs of eleven percent, judged by the Court of Justice of São Paulo. The amount of demurrage is almost eighty times the amount of the freight of the three containers (R$ 14,000) and thirty times the amount of the cargo transported (R$ 39,000), and the cause of the delay was due to a Customs error which demanded an Import License, although 288 days later, Environmental Agency (IBAMA) indicated that the Import License was not necessary.

With the argument that moderation (art. 20, II, a, of the Law of Antaq) only encompasses freight and tariffs and that demurrage has a legal nature of pre-established indemnification, it is understood that the "limitation is mere rhetoric". The report of the rapporteur Director of Antaq, Francisval Mendes, understood that:

> Moreover, that in the long proceedings of the appellant it mistakes moderation of prices for collection for demurrage. The relationship that is imposed in its allegations between the sum owed and for transportation and the amounts collected for demurrage is improper. The moderation shall be determined related to the amount collected for the transportation itself and not related to the time elapsed which led to the collection of demurrage.

Clearly, assessing amount of transportation as indemnification for long period of absence of return of box, surely gives large figures and it seems to be disproportional. But, for purposes of price moderation, it is no more than rhetoric.[12]

Well, one can only agree with such argument of the vote of the rapporteur, approved unanimously by the Executive Board, which will mean that appropriate service can never exist

[12] BRASIL, Agência Nacional de Transportes Aquaviários. Antaq, Voto do Diretor Francisval Mendes. Fls. 4/6 SEI 051404, Proc. n. 50.300.005313/2018-01. Data do voto: 03 de agosto de 2018. Available at:<www.antaq.gov.br>. Accessed on: 10 april 2019.

bearing in mind the negative externality arising from surcharges and other prices besides freight, such as demurrage, allowed in the case reported, of eighty times the amount of the freight. It is seen that Antaq did not analyze the case in the light of the condition of moderation of art. 3, VII, of Normative Resolution 18/2017, as the price of demurrage is pre-fixed indemnification or penal clause. On the contrary, it sought to make the argumentation of limitation in the light of moderateness of the Law of Antaq, without observing RN 18/2017.

Antaq in the aforesaid decision expressly infringes the condition of moderation, gives a "blank check" so that the transportation or its intermediary agent can charge an amount without limit, and contributes to the logistical costs in Brazil, especially in maritime transportation, are the highest in the world.

It is Crystal clear that the decision of Antaq was not appropriate, because it is indispensable to establish objective criteria to limit the price of waterway transportation services, under penalty of there not being effective appropriate service, bearing in mind that moderation is a condition of the aforesaid service. The decision, therefore is in disagreement with the spirit of the Law of Antaq and with the sense of Law 10.233/2001 and RN 18/2017, which was edited and approved, by the same executive board. The same regulatory problem occurs in the port sector, as will be shown further on.

2.3 In the port sector

In the same way that there is a resolution which sets forth concerning the rights and duties of users, maritime transportation and the intermediary agent in waterway transportation (RN 18/2017, of Antaq), in 2014 Resolution 3.274, Port Regulation, was edited, being intended for the administration of organized ports lessees of port installations and areas, port operators and those authorized of port installations.

The standard intends to establish obligations for rendering appropriate service, as well as defining the respective administrative infringements, in the terms of Law 10.233, of June 5, 2001, and Law 12.815, of June 5, 2013. (Wording given by Normative Resolution 02-ANTAQ, of 2015)

Appropriate service is a basic right of the user of the aforesaid services, including the standard of moderation, in the terms of subsection I, of art. 2, namely:

> Art. 2 Basic rights and duties of the User are, without loss of others established in specific legislation and contractually: I - to receive appropriate service: a) observing the standards of regularity, continuity, efficiency, safety, updating, generality, courtesy, moderation, respect for the environment and other requirements defined by ANTAQ;

It is emphasized that there is punishment for the Port Authority which fails to control port operation regarding the rendering of appropriate service, including with fine, in the terms of subsection XXX, of art. 33, *in verbis:*

> Art. 33. Administrative infringements of the Port Authority, subjecting it to punishment by the respective sanctions, are constituted of:
> (...)

> XXX - failing to control port operation regarding the rendering of appropriate service: fine of up to R$ 500,000.00 (five hundred thousand reais); and (Wording given by Normative Resolution 02-ANTAQ, of 2015)

It is also mentioned that the Port Regulation, as it sets forth about moderation as a basic right of the user and minimum condition of appropriate service, we see:

> Art. 2 Basic rights and duties of the User are, without loss of others established in specific legislation and contractually: I - to receive appropriate service:
>
> I - to receive appropriate service: a) observing the standards of regularity, continuity, efficiency, safety, updating, generality, courtesy, moderation, respect for the environment and other requirements defined by ANTAQ;
>
> Art. 3 The Port Authority, the lessee, the authorized entity and the port operator shall observe permanently, without loss of other obligations appearing in the applicable regulations and respective contracts, the following minimum conditions: (...)
>
> VII - moderation, adopting tariffs or prices in a fair, transparent and non- discriminatory basis for users and which reflect the complexity and costs of the activities, observing the ceiling prices or tariffs, provided that they are established by ANTAQ;

2.3.1. Case study: the collection of port storage

It deals with a case involving judicial collection against importer filed by terminal of private use, in the amount of R$ 479,535.87 (four hundred and seventy-nine thousand, five hundred and thirty-five Brazilian reais and eighty-seven cents), referring to storage of two containers, in the period of 311 and 307 days.

The cargo was declared destroyed and auctioned for R$ 53,493.53 (fifty-three thousand, four hundred and ninety-three Brazilian reais and fifty-three centavos). It is emphasized that the port terminal is verticalized and the storage price is approximately three times that of the nearest port terminals, que which do not have a shipowner shareholder.

Urged by the user to impose limits on price freedom, in the case of abusive prices, Antaq, through instruction of the Superintendent of Port Regulation, decided as follows:

> To Control Superintendency
> Subject: Supposed abusive collection of storage
> Regarding Instruction SFC 0322409, I return the records with the expression of this Superintendency indicating that the standards edited by this Agency already foresee appropriately the regulation concerning collection of the prices practiced by the authorized private terminals; for which reason In understand that for now it there is no need for any additional regulation concerning the matter.
> Sincerely,
> Flávia Morais Lopes Takafashi - Superintendent of Regulation [13]

Similar to the decision uttered in the claim of economic regulation in maritime transportation, the port service, according to the aforesaid decision, continues being interpreted in a way not appropriate with that determined by the regulatory milestone, especially concerning the condition of appropriate service.

[13] BRASIL, Agência Nacional de Transportes Aquaviários. Antaq, Despacho da Superintendente de Regulação. Flavia Takafaschi. SEI 0331551, Proc. n. 50.300.004255/2017-91. Data do despacho: 16 de agosto de 2017. Available at:<www.antaq.gov.br>. Accessed on: 10 april 2019.

As in the decision involving the user's request for adjustment in RN 18/2017, concerning the price limitation of port storage, without any founded technical study, Antaq opted for the preponderance of price freedom, even though in oligopoly oriented environment and without defense of competition, related to moderation.

2.4. Moderation as assumption for appropriate service

Although moderation is in the standards of Antaq and is one of the most relevant conditions of appropriate service, contradictorily, without any deep study, based upon the rhetoric of free initiative, free market and free price, Antaq has allowed prices of maritime transportation and port services without any limit imposed by the State.

2.4.1. The infringement of isonomy regarding the limitation of civil liability

There is also stressed the requirement of isonomic treatment between the right of the maritime transporter to limit its civil liability and that of the user to limit payment for the use of the container.

The maritime transporter in freighting its ship to a third party has the institute of demurrage to reduce the risk of its operation, configured in excess time arising from port operation of loading and unloading, beyond the term agreed. The same occurs related to the use of the container.

Thus, it is relevant that there is a fair Division of risk between the parties, i.e., between the maritime transporter and the user, so that if there is not such forecast at a legislative level or a balanced contract, it is the duty of the arbitrator to interpret and apply the principle of moderation in the case concerned. Acting thus, it will fill in the gap in the case concerned, resolving the case in the most efficient economic way and maintaining the relationship so that such decision is useful for formatting future contracts.

Upon dealing with this problem of division of risks in demurrage in freightage contract, always seeking the balance of interest between the parties, Hugo Tiberg states the following:

> In some legal systems this division is provided for by the written law. It is then important that the legislator should frame the rules in awareness of the economic issues. In other systems it is the courts that work out the principles, and even in the legislative systems courts have an important function on filling out the lacunae of the written law and providing detailed solutions. In all such decision-making, courts develop instruments for future contractors, to be used by them in shaping their relationship. "This formula", says the court, "gives the result. That formula gives that result." And no formula at all gives such-and-such a result. However the courts choose to divide time risks between ship and charterer, it is desirable that they should do it in such a way *as to provide future contractors with suitable instruments for shaping their relationship in an economically efficient manner.*[14]

[14] TIBERG, Hugo. **The Law of Demurrage.** Fifth Edition. London: Thomson Reuters, Sweet & Maxweel, 2013, p. 125..

Furthermore there is no limit to demurrage of container, so that to make moderation in price effective, such limitation is relevant regarding the lack of isonomic treatment between the transporter (it has its risk limited) and the user (without limitation to the risk thereof).

This occurs because it has at least four legal provisions to limit its civil liability related to the service rendered to the user (main obligation: transportation and accessory obligation: use of container), however, there is no limitation to the user's risk related to the service rendered by the transporter.

The maritime transporter upon chartering its ship to a third party has the institute of demurrage to reduce the risk of its operation, configured in the excess time arising from the port operation of loading and unloading, beyond the term established. The same occurs related to the use of the container

Thus, why can the adherent to the waybill (user) not have its civil liability limited, with the reduction of the amount in the container demurrage amount?

Indeed, the transporter when there is mention of the cargo amount in the maritime waybill, has its liability limited to the damage caused to the user, as per art. 750 of the Civil Code:

> Art. 750. The liability of the transporter, limited to the amount appearing in the waybill, begins at the moment it, or its workers, receives the item; it ends when it is delivered to the addressee, or deposited in court, if it is not found.

The same occurs when there is not such mention, the amount being limited to that set forth in art. 17 to 19 of Law 9.611/1998 and art. 16, § 1, 2 and 3 of Decree 3.411/2000. Furthermore, art. 19 of the aforesaid law is crystal clear about the limitation of the responsibility of the maritime transporter: *Art. 19. The accrued liability of the Multimodal Transportation Operator shall not exceed the limits of liability for total loss of the goods.*

The limitation of the International Convention concerning Civil liability caused by Pollution by oil (CLC 69), ratified by Brazil through Decree 79.437, of March 28, 1977, is also emphasized.

Now, if the legislation which regulates the activity of the maritime transporter protects it, why can it not protect by means of limitation the activity of the users of the services, regarding a collection action by the one that is exposed to the same risk as the maritime carrier?

CONCLUSIONS

The appropriate service so disclosed by Antaq is far from existing if it continues to allow, based upon the rhetoric of free initiative and price freedom, the collection of prices, tariffs and surcharges without objective criteria to limit their amount, when clearly excessive, such as the demurrage of container and port storage of terminal of private use.

It can be concluded that moderation is a relevant condition for balancing the costs in maritime transportation. As seen, although there are many arguments for their execution, they do not in themselves ensure moderation.

Thus, to improve the regulatory milestone, it is expected that Antaq, a State agency, in its normative production, seeks effectiveness of the Federal Constitution, by means of balance in the maritime transportation environment and the port sector, through adding certain measures, including:

a) isonomy in the risk treatment of the activity of the maritime transporter and the activity of the user, especially because the former has express legal provision through several standards.

b) prohibition of collection by port service arising from fact that the user did not cause, especially when dealing with expenses arising from storage by omission of port and

c) identification of objective criteria for limitation of price of demurrage of container and port services, especially storage

There are more than two hundred thousand users in the sector regulated by the agency, most of them importers and exporters, which undergo problems of unpredictability and immoderation, which can be resolved with the principles of RN 18/2017.

It is believed that the aforesaid suggestions can, in some way, contribute to adjustments in RN 18/2017, and the employees of Antaq can tackle technically and focusing on public interest the aforementioned problems, and thereby contribute to making effective the aforesaid constitutional provisions (art. 170, V; art. 174, head provision and art. 175, sole paragraph, subsection IV) and providing the user with appropriate service.

Furthermore, it is necessary to seek effectiveness of the defense of competition, by means of a standard which can identify and punish conduct that infringes the Antitrust Law in the scope of this agency, a necessary condition so that the principles of defense of the user and economic order can really be executed, and contribute to improving the quality of the service rendered in maritime transportation and port activity.

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ACCESS TO JUSTICE: LEGAL CONCEPT AND CHARACTERIZATION

Bruno Makowiecky Salles[1]
Paulo Márcio Cruz[2]

Access to Justice is an institute of remote historical origins. Although an analytical temporal rescue about the evolution of the idea of Access to Justice goes beyond the objectives of this study[3], centered on presenting the theme in its contemporary vision in Western societies, it is important to make a brief record of distant historical indications, able to illustrate the vital character of the concerns about the theme and to reflect the different ways in which it could be conceived in the course of civilizations.

The Code of Hammurabi, one of the earliest written norms of mankind, dating from the 18th century BC, already contained in the epilogue a provision that made to identify the possibility of Access to the sovereign by the hyposufficient for the resolution of problems and information about rights possible[4]. This prediction refers to the existence of an authority responsible for ensuring justice and resolving conflicts in a comprehensible normative order.

The document states the following:

> Em minha sabedoria, eu vos refreio para que o forte não oprima o fraco e para que seja feita justiça à viúva e ao órfão. Que cada homem oprimido compareça diante de mim, como rei que sou da justiça. Deixai ler a inscrição do meu monumento. Deixai-o atentar nas minhas ponderadas palavras. E possa o meu monumento iluminá-lo quanto à causa que traz e possa ele compreender o seu caso.[5]

The roots of Access to Justice are associated in doctrinal studies[6] also with the biblical passage of Deuteronomy in the Old Testament, written in the 6th century BC, according to which "Judges and officers shalt thou make thee in all thy gates, which the Lord thy God giveth thee, throughout thy tribes: and they shall judge the people with just judgment"[7]. In this excerpt, reference can be made to the need for an impartial and equidistant third-party figure invested in the public authority to resolve conflicts of interest in societies in accordance with notions of justice.

The English Magna Carta of 1215, in turn, provides that no one will be sold, refused or delayed the Access to Law or Justice, as stated in the text that "To no one will we sell, to no one

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[1] PhD in Legal Science from the Graduate Program in Legal Science (Stricto Sensu) - PPCJ/ University of Vale do Itajaí (UNIVALI), Brazil, Dottorato in Giurisprudenza from the Universitá di Perugia - Italy, Judge of the Court of Justice of Santa Catarina.

[2] PhD in State Law from the Federal University of Santa Catarina, Brazil. Professor and coordinator at the Graduate Program in Legal Science (Stricto Sensu) - PPCJ/UNIVALI. Visiting Professor at the University of Perugia (Italy) and Alicante (Spain).

[3] For those interested, there are important historical rescues in PAROSKY, Mauro Vasni. **Direitos fundamentais e acesso à justiça na constituição.** São Paulo: Ltr, 2008, p. 148-188; CARNEIRO, Paulo Cezar Pinheiro. **Acesso à justiça:** juizados especiais cíveis e ação civil pública: uma nova sistematização da teoria geral do processo. Rio de Janeiro: Forense, 1999, p. 03-51; e MENDONÇA, J.J. Florentino dos Santos**. Acesso equitativo ao direito e à justiça**. São Paulo: Almedina, 2016. p.19-51.

[4] OLIVEIRA, Pedro Miranda de. Concepções sobre acesso à justiça. **Revista Dialética de Direito Processual – Rddp.** São Paulo, n. 82, janeiro 2010, p. 43

[5] Free translation: "In my wisdom, I restrained them; that the strong might not oppose the weak, and that they should give justice to the orphan and the widow. Let any oppressed man, who has a cause, come before my image as king of righteousness! Let him read the inscription on my monument! Let him give heed to my weighty words! And may my monument enlighten him as to his cause and may he understand his case". **CÓDIGO DE HAMURABI; código de manu (livros oitavo e novo); lei das XII tábuas**. Supervisão editorial Jair Lot Vieira. São Paulo: Edipro, 3. ed., 2011. p. 39-40.

[6] LIMA, George Marmelstein. **O Direito fundamental à ação:** o direito de ação, o acesso à justiça e a inafastabilidade do controle jurisdicional à luz de uma adequada e atualizada teoria constitucional dos direitos fundamentais. Fortaleza: georgemlima.blogspot.com, 1999. p. 30. Disponível em: < http://georgemlima.xpg.uol.com.br/odfa.pdf >. Acesso em 5 de janeiro de 2017

[7] Retrieved from BÍBLIA, Antigo Testamento. Deuteronômio, 16:18. In: **A bíblia sagrada.** Tradução de João Ferreira de Almeida. LCC publicações eletrônicas. Disponível em: < http://www.culturabrasil.org/biblia.htm >. Acesso em 23 de outubro de 2017

we will refuse or delay, right or justice"[8]. In the document it can be seen, in view of the evolution of the ideals of freedom against authoritarian conceptions of the State, and of the spelling in the second person plural, a possible embryo about the sharing, theorized today, between the State organs and the organized society in the guarantee of rights and justice. The text evolves in the logic of the previous predictions and conveys the idea that Access does not consist of a burden concentrated on sovereign authorities, on which it depends to obtain law and justice, but a common duty to achieve such ideals and the right of all to persecute before the courts, if necessary.

Contemporaneously, Access to Justice is considered an integral element of the category of Human Rights[9], it is found in the Constitutions of several countries[10] and can be considered, even in the ordinances where there is no expressed normative provision, an implicit right in the Constitutional State of Law, in the democratic regime and in the systematic separation of State powers[11], also being inherent, notably in systems linked to the Common Law family, to the due process of law clause[12].

A good example is Pietro Pustrono's statement:

> L'accesso individuale alla giustizia a tutela dei propri diritti costituisce um diritto umano di carattere fondamentale, che sembra avere assunto, almeno nel suo nucleo essenziale, natura consuetudinaria. Riconosciuto quale diritto costituzionalmente protetto in diversi ordinamenti, il diritto di accesso alla giustizia è ormai contemplato in numerosi strumenti convenzionali a tutela dei diritti umani e sembra rappresentare, in tali sistemi pattizi, uma delle garanzie di maggiore rilevanza.[13]

In an initial approach to the contemporary meaning of Access to Justice, it is possible to state that an order franchises such Access to someone "when there are effective remedies available to that person to vindicate his or her legal rights and advance his or her legally recognized interests"[14]. Understood in this way, Access to Justice is one of the pillars of the rule of law and democracy[15], with the aim of allowing laws and rights to be claimed by all and applied, as well as to give each citizen the prerogative of having their claims sought and their rights granted on equal terms[16].

It is a complex legal construction, which study brings together perspectives whose presence in legal systems, today, appears under various formulas. Whether as a human right on the international level or as a fundamental right in the Constitutions, Access to Justice has the proper attributes of rights of such magnitude, such as the notes of universality, unavailability,

[8] The text is available in the following work: MAGNA CARTA. **The great carter of english liberty granted: by king Jon at Runnemed at 15 june, 1215**. Nu Visions Publications LCC (recurso eletrônico – ebook): 2004, p. 09. The great carter of English liberty granted: by king John at Runnymede on the 15th of June, 1215. Nu Visions Publications LCC.

[9] On the categorization of Access as a human right, see CÂMARA, Alexandre Freitas. **O acesso à justiça no plano dos direitos humanos**. In: QUEIROZ, Raphael Augusto Sofiati de (Org.). **Acesso à justiça.** Rio de Janeiro: Lumen Juris, 2002, p. 3.

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[12] In this regard, see VELLOSO, Carlos Mário da Silva. Apresentação. In: NALINI, José Renato. **O juiz e o acesso à justiça.** 2. ed. rev., atual. e ampl. São Paulo: Revista dos Tribunais, 2000, p. 7.

[13] Free translation: "Individual access to justice to protect one's rights is a fundamental human right, which seems to have assumed, at least in its essential core, a customary nature. Recognized as a constitutionally protected right in various jurisdictions, the right of access to justice is now contemplated in numerous conventional instruments for the protection of human rights and seems to represent, in these systems, one of the most important guarantees" PUSTRONO, Pietro. Accesso alla giustizia e protezione diplomatica. In: FRANCIONI, Francesco; GESTRI, Marco; RONZITTI, Natalino; SCOVAZZI, Tullio. **Acesso alla giustizia dell'individuo nel diritto internazionale e dell'unione europea**. Milano: Giuffré, 2009. p. 69.

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[16] CONFORD, Tom. The meaning of access to justice. In: PALMER, Ellie; CONFORD, Tom; GUINCHARD, Audrey; e MARIQUE, Yseult. **Access to justice**. p. 29.

inalienability, imprescriptibility and normative force[17] which, within limits, characterize us. As a normative species, Access to Justice is usually presented as the norm principle[18], due to the form of its positivization and other aspects[19]. Even when not standardized, Access is an implicit principle that guides state and private activities towards the distribution of justice and rights[20]. In any of the above circumstances, it emerges primarily as an authentic right, enshrined in norms, expressed or implied, contained in more closed or more open precepts, which in any case recognize it as a right, even if it has, a related and intimate, also a guarantee function, that is, an assurance profile of allowing the enjoyment of other rights in state and private spheres, jurisdictional or not. Hence it is said that one takes care of a right, but a right "*funzionale o servente*", paving the way to rectify the course of things when public authorities or private actors violate rights or expose them to risk. For this reason, it contributes to increase "*l'adattamento dell'ordinamento ai diritti fondamentali*" [21], without, however, being confused with guarantee actions or specific institutes such as *habeas corpus* and others.

The right of Access is commonly categorized as a prestational fundamental right, situated among those of the second dimension[22], of those who depend on state interventions (*facere*) for their promotion, in order to ensure the accessibility of all, on equal terms, to certain goods of life, in or out of judgment. No wonder, the theme was *habitué* to the post-World War II scenario, the prestigious era of welfare state philosophy[23]. This prestational component may indeed be the one with the most adherence to its nature, but it does not exhaust it. Access to Justice can also be seen as a kind of fundamental freedom, in the sense that the legislature has a maximum obligation to impose vetoes (*non-facere)* on acts that are against its core, in order to safeguard the mechanisms of protection of rights[24]. In this sense it reveals itself as a first-dimension civil right, necessary for individual freedom alongside rights such as property and free contracting, differing only in that it is linked to the prerogative of protecting one's rights in terms of equality through due process of law[25]. In addition, connections are also found between Access and political rights, as through acts of claim, it is possible to participate actively and democratically in public decision-making in the exercise of inclusive citizenship[26]. If this combination of elements was not sufficient, the understanding of Access to Justice is not exhausted in the relations between State and

[17] MENDONÇA, J.J. Florentino dos Santos**. Acesso equitativo ao direito e à justiça**. p. 122

[18] Regarding this topic, see CRUZ, Paulo Márcio. **Fundamentos do direito constitucional**. 13 ed. Curitiba: Juruá Editora. 2012, p. 132.

[19] Principles and rules are both species of the legal norms. The discussions about the elements that set them apart are rich, but they don't fit in this article. For the purposes of this work, we adopt the current according to which the distinction between norms-rules and norms-principles lies mainly in their degrees of abstraction and generality, with reflexes in the mechanisms of application. While rule norms are often circumscribed in factual assumptions that trigger predetermined legal consequences, principles, understood as the core commandments of the legal system, have open content and are noted for greater flexibility. The logic of application of the rules, because of this structural rigidity, is based on the premise of "all or nothing": either the rule applies to a particular case or does not apply, because it consecrates definitive and exclusive rights, and does not boast flexible working mechanics. The impact of the principles, on the other hand, admits consideration. Given the open structure, the principles define prima facie rights, prescribing, as commandments of optimization, that these rights be realized to the greatest extent possible within the existing factual and legal possibilities. In case of collision between principles, therefore, weighting is allowed, also marked by numerous parameters that do not fit this topic. On the subject, see ALEXY, Robert. **Teoria dos Direitos Fundamentais.** Tradução de Virgílio Afonso da Silva. São Paulo: Malheiros, 2008, Título original: Theorie der Grundretche. p. 86. Ainda: DWORKIN, Ronald. **Levando os direitos a sério**. Tradução de Nelson Boeira. São Paulo: Martins Fontes, 2011. Título original: Taking Rights Seriously. p. 39-42.

[20] MENDONÇA, J.J. Florentino dos Santos**. Acesso equitativo ao direito e à justiça**. p. 15.

[21] Free translation: "functional or servant law" and "the adaptation of the legal system to fundamental rights". OSTI, Alessandra. **Teoria e prassi dell'access to justice**. p. 11 e 12.

[22] MENDONÇA, J.J. Florentino dos Santos**. Acesso equitativo ao direito e à justiça**. p. 55 e 197

[23] CAPLEN, Andrew. Access to justice: the view from the law society. In: PALMER, Ellie; CONFORD, Tom; GUINCHARD, Audrey; e MARIQUE, Yseult. **Access to justice**. p. 18.

[24] OSTI, Alessandra. **Teoria e prassi dell'access to justice**. p. 22-23

[25] CONFORD, TOM. The meaning of access to justice. In: PALMER, Ellie; CONFORD, Tom; GUINCHARD, Audrey; e MARIQUE, Yseult. **Access to justice**. p. 33

[26] Regarding this theme, see ABREU, Pedro Manoel. **Processo e democracia**: o processo jurisdicional como um locus da democracia participativa e da cidadania inclusiva no estado democrático de direito. v. 3. São Paulo: Conceito Editorial, 2011

individuals, presupposing the joint action and the sharing of responsibilities between state power and civil society[27].

There is talk of Access to Justice at all stages of legal episodes[28]. Ever since it arouses, in one's conscience, a certain doubt or legal problem, the idea of Access assures assistance for legal advice and counseling, including pre-procedural stages. Also based on Access to Justice, if the problem persists, the right to legal assistance in extrajudicial proceedings before public and private bodies is theorized, or, where it exists, in the Administrative Jurisdiction. Nowadays, it is well understood that the idea of Access to Justice even includes private spaces for dispute resolution, provided that they are adequate and efficient, such as alternative methods (Alternative Dispute Resolution - ADR) such as extrajudicial mediation and conciliation.

The classic sense is added to all this, in an even more intuitive way, of associating it with the provision of judicial representation and the possibility of claiming rights in court, extending to ensure the proper course of the judicial process until the final phase of the judgment proceedings and enforcement[29]. In this sense, Access to Justice involves a double dimension[30]: the private or particular one, more restricted, and the public, a broader one. The first results from the resolution, on a case-by-case basis, of conflicts of interest, enabling the enjoyment of rights or awarding solutions, in order to attend those interested in the outcome. The second comes from the diffuse effect of this problem resolution, which leads to the restoration of violated legalities and, designed in a broader scenario, provides security, enshrines rights and duties, stabilizes social and economic development, and benefits the community.

To illustrate these two meanings, the doctrinal contribution of Osti is relevant:

> Risulta dunque evidente da quanto detto che l'accesso alla giustizia contiene in sé uma dimensione publica relevante e prevalente rispetto a quella privatistica: esso serve 'in primis' per garantire, attraverso la soluzione di singole fattispecie, il ripristino della legalità e la promozione dei diritti a vantaggio dell'intera collettività.[31].

Also the role of interpreters and law enforcers in the national and international spectrum is paramount in defining what is to be understood as the current content and extension of Access to Justice. It is up to the courts to shape the conformation of law to the extent that controversy arises, and this definition is not linked solely to the "degree of normativity" or the "breadth of remedies available", but also to the factual possibilities and constraints imposed in the name of the public interest and rationalization of state services. The discussion is not without prejudice to the permanent tension between normativity and real factors[32] that inform the problem of the realization of rights. Nor is it caught in abstractions beyond the content of the norms, precedents, traditions, procedural practices, and political choices of each system.[33]

Given these observations on the Access to Justice, it can be said that, as stated by Mendonça[34], the establishment of its framework, content and meaning has been established as a

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[27] Regarding this theme, see RAPOSO, Mário. Nota sumária sobre o art. 20º da Constituição. **Revista da Ordem dos Advogados**. Lisboa: v. III, Ano 44, p. 523-543, dezembro de 1984.

[28] OSTI, Alessandra. **Teoria e prassi dell'access to justice**. p. 148.

[29] OSTI, Alessandra. **Teoria e prassi dell'access to justice**. p. 148-149.

[30] OSTI, Alessandra. **Teoria e prassi dell'access to justice**. p. 148

[31] Free translation: "It is therefore evident from what has been said that access to justice contains in itself a relevant and prevalent public dimension with respect to the private one: it serves primarily to guarantee, through the solution of single cases, the restoration of legality and the promotion of rights for the benefit of the entire community" OSTI, Alessandra. **Teoria e prassi dell'access to justice**, p. 12.

[32] In this regard, it is worth remembering the notable contribution of Konrad Hesse. According to the author, although the Constitution is conditioned by the historical reality ('being'), it does not only configure the reproduction of this reality that conditions it, but it rather presents a normative force also able to conform and ordain the political and social order ('must be'), with the weakest part not always being reputed when faced with real factors of power HESSE, Konrad. **A força normativa da constituição**. Tradução de Gilmar Ferreira Mendes. Porto Alegre: Sério Antonio Fabris, 1991. Título original: Die normative Kraft der Verfassung.

[33] In this sense, see Mendonça MENDONÇA, J.J. Florentino dos Santos**. Acesso equitativo ao direito e à justiça**. p. 158.

[34] MENDONÇA, J.J. Florentino dos Santos**. Acesso equitativo ao direito e à justiça**. p. 16.

function linked to the exercise of judicial activity, entrusted to the national courts when confronted with contentious cases, in establishing the meanings and extensions of the applicable normative commands, and, at the international and community levels, it is entrusted to the Supranational Courts, established as the bodies responsible for the interpretation and application of the treaties and other international and community diplomas, and the delimitation of the content of the rights enshrined in them in accordance with the political guidelines supported by the respective treaties.

For all these reasons, it can be seen that Access to Justice is one of those kaleidoscopic expressions, reflecting a concept that "draws the mind to a multitude of questions about the sources of injustice and the legal systems around the world that have developed to help provide an avenue for redressing a wrong"[35]. It is possible to state that "*Plusieurs notions entretiennent des liens étroits avec l'accès au juge*" [36], as it can be seen from the listed historical references and their elements. Due to this dispersion of meanings, the word eventually became an abbreviation for a set of situations, a series of problems and various objectives. While some adopt narrower views, others "encompass in that single word nearly every problem experienced by the judicial system"[37], making necessary delimitations for the apprehension of the approaches attributed here to the theme.

In view of the multiplicity of meanings of the expression Access to Justice (*lato sensu*) and the richness of the various aspects involved in the theme, it has already been observed that "*Il est paradoxalement plus aisé de définir ce que n'est pas le droit d'áccès au juge plutôt que d'essayer de formaliser ce qui'il nest*" [38].

For the purposes of this paper, Access to Justice (*lato sensu*) is legally viewed, in a limited way, in the context of **accessibility to the judiciary and the rights** affirmed or extracted from the legal order, which define "which of the supposed fair allows the use of force by the State"[39] (Dworkin, 2007, p. 122). With the same approach assumed by Tom Conford, here the "access to justice is access to legal justice it is not to be confused with justice in a more general sense"[40], without the possibility to enter into philosophical concepts of justice.

Legal studies on Access to Justice sometimes deal with internal issues of positive law, more dogmatic[41] and linked to the effectiveness of the judicial process as an instrument for conflict resolution[42]. In this sense, they tend to evaluate specific systems of procedural law, including the conditions for the exercise of the right to act, the procedural assumptions, the procedures governing individual and collective actions, appeal possibilities and others. Then, the focus is on

[35] RICE, Thomas H. Speedy; REISMAN Brandie L. Access to justice for tort claims against a sovereign in the courts of the united states of America. In: FRANCIONI, Francesco; GESTRI, Marco; RONZITTI, Natalino; e SCOVAZZI, Tullio. **Acesso alla aiustizia dell'individuo nel diritto Internazionale e dell'unione europea.** Milano: Giuffré, 2009. p. 257.

[36] Free translation: "Several concepts have close links to the idea of access to judge" DONIER, Virgine; LAPÉROU-SCHNEIDER, Béatrice; GERBAY, Nicolas; HOURQUEBIE, Fabrice; e ICARD, Philippe. Propos introductifs, In: DONIER, Virgine; LAPÉROU-SCHNEIDER, Béatrice (sous la direction)**. L'accès au juge:** reserche sur l'effectivité d'un droit. Bruxelles: Bruylant, 2003. p. 33.

[37] JOHNSON JR., Earl. Thinking about access: a preliminary typology of possible strategies. In: CAPPELLETTI, Mauro; GARTH, Bryan. **Access to justice**. v III: emerging issues and perspectives. Milano: Giuffrè; Alphen aan den Rijn: Sijthoff & Noordhoff. 1978-1979, p. 07-08.

[38] Free translation: "It is paradoxically easier to define what is not the right of access to the judge than to try to formalize what it is" DONIER, Virgine; LAPÉROU-SCHNEIDER, Béatrice; GERBAY, Nicolas; HOURQUEBIE, Fabrice; e ICARD, Philippe. Propos introductifs, In: DONIER, Virgine; LAPÉROU-SCHNEIDER, Béatrice (sous la direction)**. L'accès au juge**. p. 32.

[39] DWORKIN, Ronald. **O Império do direito**. Tradução de Jefferson Luiz Camargo. Revisão técnica de Gildo Sá Leitão Rios. 2 ed. São Paulo: Martins Fontes, 2007. Título original: Law's Empire. p. 122

[40] CONFORD, TOM. The meaning of access to justice. In: PALMER, Ellie; CONFORD, Tom; GUINCHARD, Audrey; e MARIQUE, Yseult. **Access to justice**. p. 33.

[41] Dogmatic analysis traditionally seeks to give evidence to basic concepts built on the logic of legal positivism. Regarding this topic, see FERRARI, Giuseppe Franco. Civil law e << common law >>: aspetti pubblicistici. In: CARROZZA, Paolo; GIOVINI, Alfonso di; e FERRARI, Giuseppe Franco (a cura di). **Diritto costituzionale comparato**. p. 775.

[42] About that see ABREU, Pedro Manoel. **Acesso à justiça e juizados especiais:** o desafio histórico da consolidação de uma justiça cidadã no Brasil. 2ª ed. rev. e atual. Florianópolis: Conceito Editorial, 2008, p. 31.

technical-legal issues, of formal dimensions and related to the organizational modalities for accessibility to Justice, as well as the calculation of the hits and defects in a given procedural system[43]. There is the perspective which can be called eminently ***legal and procedural***.

Just as often, however, the subject is researched on a broader, non-dogmatic basis, situated in the context of the role of the legal system and the judiciary in democratic regimes, including the relations between society and State, the intersections between law and politics and social justice itself. From this perspective, understanding the meaning of Access to Justice presupposes "an understanding of concepts such as separation of powers between the judiciary, executive, and legislative branches of government, the political question doctrine"[44] and political history itself. The focus here is on the approaches to justice in general, or on the extension of the duties assigned to judges in the rule of law to guarantee to citizens. It encompasses the definition of justice and the playing field of the judiciary in democratic regimes, in interactions with other Powers[45]. It is, therefore, a ***democratic-institutional*** order.

Despite these distinctions, it is not advisable to completely cleave such ways of seeing Access to Justice, given the close correlation between them and the fact that procedural institutes are preordained, among other things, to enable judicial action. This interaction between the constitutional right of Access to Justice and other branches of law, in particular procedural law, often occurs and, strictly speaking, allows the "*diritto costituzionale di forgiare il diritto processuale al fine di renderlo atto a tutelare in concreto i diritti fondamentali, la democracia e lo Stato di diritto, nell' ambito dei sempre necessari sforzi volti all'efficientamento del sistema giudiziario*"[46].

In the contemporary state of the art on Access to Justice there are also basically two ***prevailing conceptions***[47], which have repercussions on the way the subject is traditionally treated in foreign and national doctrines. With the expression, it is meant, in short, to refer to "*la possibilità per ogni essere umano di accedere agli strumenti, generalmente giurisdizionali"*, but also extrajudicial, "*predisposti dall'ordinamento, posti a tutela dei propri diritti o interesi*" [48].

The first conception takes as Access to Justice the input of a given claim, through the exercise of the right of action, in the institutionalized judicial system. The spirit is to invoke the Jurisdiction for the settlement of the conflict, the declaration and the enforcement of the applicable[49], by adopting an "*approccio procedimentale che si resolve con la símplice equazione giustizia/sistema giurisdizionale*" [50]. The second conception, on the other hand, broadens the idea of Access to Justice to project it beyond the variable linked to the proposition of the action or the use of the judicial system. To this end, the whole socio-political-cultural context is assessed and the degree of legal information[51] and citizens' level of accessibility to rights is included in the

[43] In this sense, see MAGNON, Xavier. L'accès a la justice dans la théorie generale du droit. In: BÉTAILLE, Julien (org). **Le droit d'accès à la justice em matière d'environnement.** Toulouse: Pressses de L'université Toulouse, 2016. p. 27.

[44] RICE, Thomas H. Speedy; REISMAN Brandie L. Access to justice for tort claims against a sovereign in the courts of the united states of America. In: FRANCIONI, Francesco; GESTRI, Marco; RONZITTI, Natalino; e SCOVAZZI, Tullio. **Acesso alla giustizia dell'individuo nel diritto Internazionale e dell'unione europea**. p. 257-258.

[45] DONIER, Virgine; LAPÉROU-SCHNEIDER, Béatrice; GERBAY, Nicolas; HOURQUEBIE, Fabrice; e ICARD, Philippe. Propos introductifs, In: DONIER, Virgine; LAPÉROU-SCHNEIDER, Béatrice (sous la direction)**. L'accès au juge**. p. 32.

[46] Free translation: "constitutional right to forge procedural law in order to make it fit to concretely protect fundamental rights, democracy and the rule of law, in the context of the always necessary efforts to make the judiciary more efficient" OSTI, Alessandra. **Teoria e prassi dell'access to justice**. p. 151.

[47] In this sense, see ABREU, Pedro Manoel. **Acesso à justiça e juizados especiais**. p. 36.

[48] Free translation: "the possibility for every human being to access the instruments, generally jurisdictional", "provided by law and designed to protect ones rights or interests" OSTI, Alessandra. **Teoria e prassi dell'access to justice**. p. 11.

[49] CAPPELLETTI, Mauro; GARTH, Bryant. **Acesso à justiça**. Tradução de Ellen Gracie Northfleet. Porto Alegre: Sérgio Antônio Fabris, 1988 Título original: Acess to justice: the worldwide movement do make rights effective. A general report. p. 08.

[50] Free translation: "procedural approach that is resolved with the simple equation justice / jurisdictional system" OSTI, Alessandra. **Teoria e prassi dell'access to justice**. p. 05.

[51] FOLLEVILLE, Clémence de**. L'accès au droit et à la justice**. Paris: ESF Éditeur, 2013, p. 21.

analysis, even if fruition occurs outside the judicial apparatus, whether in public bodies, in administrative proceedings, arbitration and extrajudicial mediation, or informal and private conflict resolution agencies.

In this regard, doctrine emphasizes that the

> direito de acesso à justiça é revelado como fórmula de realização do acesso ao direito que congrega o direito à informação jurídica e o direito à proteção jurídica, e como expressão da prerrogativa de acesso aos Tribunais consagrada no direito à tutela jurisdicional e na garantia de que a ninguém pode ser denegada justiça por insuficiência econômica. [52]

In the same direction, Benjamin writes that, in the strict sense, Access to Justice

> refere-se apenas a acesso à *tutela jurisdicional*, ou seja, à composição de litígios pela via judicial. Insere-se e opera, por princípio, no universo do processo. Já em sentido mais amplo embora insuficiente, quer significar acesso à *tutela de direitos ou interesses violados*, através de mecanismos jurídicos variados, judiciais ou não. Num e noutro caso, os instrumentos de acesso à justiça podem ter natureza preventiva, repressiva ou reparatória.[53]

As a result of what has been articulated so far, discussions abstracted from a philosophical base, we can elaborate a ***concept of Access to Justice (lato sensu)***, in a juridical sense, as the human right in the international field, and fundamental in the internal field, commonly positive in the form of a norm-principle, or even implicit in the legal system, with its own value and also instrumental function to other rights, the content of which is complex, it allows technical-procedural and democratic-institutional approaches, as well as involving mainly state benefits and conduct of private actors, but still incorporates aspects of rights of freedom and participation, specifying (*stricto sensu*) the possibilities of (i) Access to the Courts for the judicial provision and (ii) Access to the Rights on extrajudicial stands, in terms of information, advice and alternative methods of conflict resolution, notions that interact with each other and have their content and extension dependent on the interpretative task of judges, on the tension between the degree of normativity of law and the existing factual and legal constraints.

In order to better clarify and deepen the categories of Access to the Judiciary and Access to Rights, which are differentiated above, it is important to broaden, to the extent and within the possible limits of this paper, their concepts and characterizations. ***Access to the Judiciary***, so that an impartial, equidistant and independent third party[54], vested in the jurisdictional function of the State, resolves the conflict of interests and promotes the settlement and enforcement of disputed law is, by nature, the "*premier des droits procéduraux*", that acts as the spear and shield of all human rights [55], bearing in mind that intends to activate and defend them.

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[52] Free translation: "right of access to justice is revealed as a formula for realizing access to the right that brings together the right to legal information and the right to legal protection, and as an expression of the prerogative of access to courts enshrined in the right to judicial protection and in the guarantee that no one can be denied justice for economic insufficiency" MENDONÇA, J.J. Florentino dos Santos**. Acesso equitativo ao direito e à justiça**. p. 158.

[53] Free translation: "refers only to access to judicial protection, that is, to the composition of disputes through the courts. It fits and operates, in principle, in the universe of the process. In a broader sense, though insufficient, it means access to the protection of rights or interests violated through various legal mechanisms, judicial or otherwise. In either case, instruments of access to justice may be of preventive, repressive or reparative nature" BENJAMIN, Antonio Herman Vasconcellos e. **A insurreição da aldeia global contra o processo civil clássico:** apontamentos sobre a opressão e a libertação judiciais do meio ambiente e do consumidor. BDJur, Brasília, DF. p. 06-07. Disponível em: < http://bdjur.stj.jus.br//dspace/handle/2011/8688 >. Acesso em: 15 de novembro 2016.

[54] MAGNON, Xavier. L'accès a la justice dans la théorie generale du droit. In: BÉTAILLE, Julien (org). **Le droit d'accès à la justice em matière d'environnement**. p. 28

[55] Free translation: "first of the procedural rights" ANDRIANTSIMBAZOVINA, Joël. L'accès a la justice au sein des droits de l"homme. In: BÉTAILLE, Julien (org). **Le droit d'accès à la justice em matière d'environnement.** p. 51.

Despite its obvious relevance, access to the Judge cannot be regarded as absolute and unconditioned, provided that "*peut faire l'objet de limitations*"[56]. On the one hand, there are normative and factual, substantial and procedural restrictions to the access, related to certain rights and interests that may be protected, or the collection of costs[57], as well as formal requirements, statute of limitations, on *res judicata* and other restrictions that give the institute justified and proportionate legal treatment, provided that it preserves its essential core and the soul of the right to a fair judicial process[58]. On the other hand, the right is not limited to facilitating the entry into the justice system or securing the Day in Court, but it involves a complex instrument of protection, with offensive and defensive positions, containing the guarantees of due process[59], the contradictory and the broad defense required for a fair, effective judgment, delivered in a reasoned decision and rendered within a reasonable time.

Generally speaking, access to the Judiciary is predicated as an essential right in democratic legal systems, described as the "fundamental requirement - the most basic of human rights - of a modern and egalitarian legal system that seeks to guarantee, not just proclaim the rights of all"[60]. It is a kind of "hinge law" in which "denial would entail that of all others"[61]. These statements are based on the logic that the progressive recognition of fundamental rights in the ages of humanity would be an innocuous advance without the mechanisms to make such rights enforceable, being the access to the Judiciary a way of proceeding to the other rights. Ensuring accessibility to the Judiciary, thus, emerges as one of the primary duties of government, including the civil and criminal areas, the first regulating private conduct and the second linked to the state duty to maintain order and peace[62].

Similar thinking is enshrined in foreign and national doctrines. Lenzerini and Mori teach that "*l'azionabilità di um diritto costituice una condizione imprescindible per garantirne l'effettività. In altre parole, il diritto di acesso alla giustizia (...) à funzionale alla realizzazzione e all'effettivo godimento dei 'diriti primari' riconosciuti*"[63]. Caplen[64] also teaches that

> the importance of access to justice cannot be underestimated. It is a fundamental corollary of the rule of law because without access to justice the rule of law can be nothing more than just a concept, an ideal. If access to justice is absent, legal rights cannot be exercised and legal obligations cannot enforced. Nor can public or private bodies be challenged through the courts, or individuals brought to account. Access to justice is essential for a humane, just and civilized society.

Sadek points out that

> os direitos são letra morta na ausência de instâncias que garantam o seu cumprimento. O Judiciário, desde este ponto de vista, tem um papel central. Cabe a ele aplicar a lei e, consequentemente,

[56] "Free translation: "may be subject to limitations" ANDRIANTSIMBAZOVINA, Joël. . L'accès a la justice au sein des droits de l"homme. In: BÉTAILLE, Julien (org). **Le droit d'accès à la justice em matière d'environnement**. p. 53. Tradução livre: "pode estar sujeito a limitações".

[57] MINIUSSI, Davide. Acesso Alla giustizia in matéria ambientale e costo del processo: un difficile equilibrio. **DPCE online (S.1)**. v. 18, n. 2, p. 1-15. 2014. Disponível em: < http://www.dpceonline.it/index.php/dpceonline/article/view/142 > Acesso em 14 de novembro de 2017.

[58] In this sense, see PACINI, Marco. Il diritto di accesso al giudici (Commento a corte europea dei diritti dell'uomo, sez. 5., 27 luglio 2007, ricorso n. 18806/02). **Giornale di diritto amministrativo**. v. 14, n. 7, p. 725-731. 2008. Disponível em: < http://www.irpa.eu/area-bibliografica/scritti/il-diritto-di-accesso-al-giudice/ >. Acesso em 14 de novembro de 2017.

[59] CANÇADO TRINDADE, Antônio Augusto. **The access of individuals to internacional justice**. New York: Oxford University Press, 2011. p. 71

[60] CAPPELLETTI, Mauro; GARTH, Bryant. **Acesso à justiça**. p. 12

[61] SANTOS, Boaventura de Souza. **Pela mão de Alice**: o social e o político na pós-modernidade. 7a ed. Porto: Edições Afrontamento, 1999, p. 146.

[62] CAPLEN, Andrew. Access to justice: the view from the law society. In: PALMER, Ellie; CONFORD, Tom; GUINCHARD, Audrey; e MARIQUE, Yseult. **Access to justice**. p. 13

[63] Free translation: "the enforceability of a law constitutes an unavoidable condition to guarantee its effectiveness. In other words, the right of access to justice (...) is functional to the realization and effective enjoyment of the 'primary rights' recognized" LENZERINI, Federico; MORI, Rebecca. Accesso alla giustizia per i migranti a rischio di violazione dei diritti fondamentali. In: FRANCIONI, Francesco; GESTRI, Marco; RONZITTI, Natalino; e SCOVAZZI, Tullio. **Acesso alla giustizia dell'individuo nel diritto Internazionale e dell'unione europea**. p. 155..

[64] CAPLEN, Andrew. Access to justice: the view from the law society. In: PALMER, Ellie; CONFORD, Tom; GUINCHARD, Audrey; e MARIQUE, Yseult. **Access to justice**. p. 24.

garantir a efetivação dos direitos individuais e coletivos. Daí ser legítimo afirmar que o Judiciário é o principal guardião das liberdades e da cidadania.[65].

Fundamental rights are seen as historical achievements in the course of evolutionary ages[66]. These rights are inherent to the human person (material aspect), normally recognized as natural rights or provided for in human rights treaties, which are considered to be properly fundamental from the moment they are inserted in constitutional provisions (formal aspect), intended to promote the ideals of freedom, equality and solidarity in the relations established between the State and society and within the latter, horizontally. They are classified into dimensions or generations[67]: while first-dimensional rights are linked to the political sign of freedom and demand an abstention from the State (property, political rights, criminal guarantees, etc.), the rights of the second dimension are supported by the values of equality and welfare and demand positive state benefits (health, education, security, social assistance, housing, etc.), whereas those of the third dimension embody the solidary commitment to the present and the future and demand the mutual engagement of the State and society (environment, consumer, sustainable development, etc.)[68]. Alongside these classic rights are theorized, albeit with criticism of the need for such classifications, fourth-dimension rights related to political pluralism, scientific progress, biotechnology and bioengineering, as well as fifth-dimension rights such as peace, peoples' self-determination and cybernetics.[69] The key idea is that all this construction would be a missing link without a Judiciary to secure such rights.

In an English work launched in the 1990s[70], resulting from research commissioned by Lord Chancellor to the Master of Rolls, the magistrate Lord Woolf[71], whose content was decisive for the advent of the 1999 Procedure Rules – CPR[72], it can be found the enumeration of some of the principles that, from the Access to Judge point of view, the justice system must meet to fulfill its role:

(a) be just in the results it delivers
(b) be fair in the way it treats litigants;
(c) offer appropriate procedure at a reasonable cost;
(d) deal with cases with reasonable speed;
(e) be understandable to those who use it;
(f) be responsive to the needs of those who use it;
(g) provide as much as certainty as the nature of particular cases allows; and

[65] Free translation: "rights are dead letters in the absence of instances that guarantee their fulfillment. The Judiciary, from this point of view, has a central role. It is up to it to apply the law and, consequently, to guarantee the realization of individual and collective rights. Hence it is legitimate to say that the Judiciary is the main guardian of freedoms and citizenship" SADEK, Maria Tereza. Introdução: experiências de Acesso à Justiça. In: SADEK, Maria Tereza (Org.). **Acesso à justiça.** São Paulo: Fundação Konrad Adenauer, 2001, p. 7.

[66] Regarding this subject, see BOBBIO, Norberto. **A era dos direitos**. Tradução de Carlos Nelson Coutinho. 10a ed. Rio de Janeiro: Campus, 1992. Título original: L'età dei Diritti.

[67] Given the complementary nature of fundamental rights, the use of the word dimensions of fundamental rights has prevailed, primarily in relation to the designative generations of fundamental rights, precisely because the terminology generations, according to the doctrine, gives the impression that the series of rights conceived in the subsequent period it succeeds and exceeds the rights previously recognized, concealing the complementarity and coexistence between rights.

[68] In relation to this theme, see SALLES, Bruno Makowiecky. **Controle jurisdicional de políticas públicas em matéria de direitos fundamentais.** 2014. 128f. Curso de Mestrado em Ciência Jurídica. Departamento do Centro de Educação de Ciências Jurídicas, Políticas e Sociais Universidade do Vale do Itajaí (UNIVALI), Itajaí, 2014. p. 33-40. Disponível em: < http://www.univali.br/Lists/TrabalhosMestrado/Attachments/1589/Microsoft%20Word%20-%20Dissertação%20Bruno%20Definitiva.pdf >. Acesso em: 22 de outubro de 2017.

[69] See Salles SALLES, Bruno Makowiecky. **Controle jurisdicional de políticas públicas em matéria de direitos fundamentais.** 2014. p. 40-41.

[70] WOOLF, Lord. **Access to justice**: final report. By the right honourable the Lord Woolf, Master of the rolls. London: HMSO, 1996.

[71] Lord Chancellor is a senior member of the Government and the Master of Rolls is considered the second most important judge in the country. In this sense, see ALMEIDA, Diego Assumpção Rezende. O case management inglês: um sistema maduro? **Revista Eletrônica de Direito Processual** - REDP. v. VII. p. 289. Disponível em: < https://www.e-publicacoes.uerj.br/index.php/redp/article/viewFile/21127/15217 >. Acesso em 21 de fevereiro de 2019.

[72] BARBOSA MOREIRA, José Carlos. A revolução processual inglesa. **Revista de processo**. São Paulo: RT, v. 118. p. 75-88, novembro de 2004.

(h) be effective: adequately resourced and organised[73]

At the same time, however, the access to the fundamental rights of freedom, equality and fraternity, and even to private and other rights, through the Judiciary, has been gaining the impression that the judicial institution is not the only or even the main institution in a democratic regime and in a scenario of legal certainty, to enable the enjoyment of such rights. Nor does it have such an institutional capacity[74], for various reasons that will not be treated here by thematic delimitation. ***Access to Rights*** on a pre or para-judicial stage[75] is also of equal importance and depends on the synergistic action of all State Powers and civil society in general[76], such as the legal professions, public bodies, private sector and third sector entities. This requires social actors to share responsibilities and a network of mutual support. Under this approach, "The core of access to justice is not (...) enabling everyone to go to court, but rather to bring justice to the context in which the parties are inserted"[77], taking into account the outcome of the solution obtained[78].

In order for extrajudicial enjoyment of rights to be possible, it is necessary for citizens to have sufficient information about their rights and duties, as well as to have adequate extrajudicial legal advice and assistance, so that they can exercise the discernment to enforce their possible prerogatives, when possible, already outside the judicial space[79]. There are adequate channels for this before other Powers, regulator organs, computerized environments created by the technological revolution[80] or alternative methods of conflict resolution, such as private mediation and arbitration, and work should be done to ensure that these spaces are of quality, equitable and efficient[81].

Legal information and advice are essential elements for such purposes, since by generating a culture of reasonable knowledge of rights and duties, they tend to contribute, on the one hand, to avoiding illegitimate expectations that lead to frivolous actions, and, on the other hand, to encourage spontaneous fulfillment of obligations[82], in order to foster more natural access to rights without prior judicialization. This is why Access to Rights brings with it something like "a cultural aspect (of material rather than formal meaning), walls of what can be understood as civism"[83].

As final considerations, it is worth noting that this paper sought to portray the state of the art of Access to Justice (*lato sensu*). Two possible perspectives were identified: one legal-procedural, linked to the effectiveness of the process as a tool for conflict resolution, and another democratic-institutional, linked to the role of the legal system and the judicial institution in democratic regimes. In addition to these perspectives, two conceptions of Access to Justice were also found and differentiated: Access to the Judiciary and Access to Rights. While the first takes care of the conditions of accessibility to the courts for the judicial enforcement of rights, the latter privileges the enjoyment of rights in extrajudicial spaces, as long as they are effective. And the dynamics of Access to Justice (*lato sensu*) also includes the coordination between these two

[73] WOOLF, Lord. **Access to justice**: final report. By the right honourable the Lord Woolf, Master of the rolls. London: HMSO, 1996. p. 02.
[74] See SUNSTEIN, Cass R.; VERMEULE, Adrian. Interpretation and institutions. **John M. Olin Program In Law and Economics.** University of Chicago Law School: n .156, p. 1-55, 2002.
[75] RAPOSO, Mário. Nota sumária sobre o art. 20º da Constituição. **Revista da Ordem dos Advogados**. p. 527.
[76] See RAPOSO, Mário. Nota sumária sobre o art. 20º da Constituição. **Revista da Ordem dos Advogados**. p. 523-543.
[77] Regarding the theme, see SANTOS, Boaventura de Souza (dir.); PEDROSO, João; TRINCÃO, Catarina; DIAS, João Paulo (coord.). **O acesso ao direito e à justiça:** um direito fundamental em questão. Coimbra: Observatório Permanente da Justiça Portuguesa (OJP), 2002. p. 11.
[78] OSTI, Alessandra. **Teoria e prassi dell'access to justice**. p. 06.
[79] FOLLEVILLE, Clémence de. **L'accès au droit et à la justice**. p. 21.
[80] TROISI, Claudia. Forme e Modelli di ADR. Profili sostanziali. In: AUTORINO, Gabriella; NOVIELLO, Daniela; TROISI, Claudia. **Mediazione e conciliazione nelle controversie civili e comerciali**. Seconda edizione. Santarcangelo di Romagna: Maggioli Editore, 2013. p. 75-76.
[81] FRANCIONI, Francesco. Il diritto di acesso alla giustizia nel diritto internazionale generale. In: FRANCIONI, Francesco; GESTRI, Marco; RONZITTI, Natalino; e SCOVAZZI, Tullio. **Acesso alla giustizia dell'individuo nel diritto Internazionale e dell'unione europea**. p. 03-06.
[82] SANTOS, Boaventura de Souza (dir.); PEDROSO, João; TRINCÃO, Catarina; DIAS, João Paulo (coord.). **O acesso ao direito e à justiça**. p. 11
[83] RAPOSO, Mário. Nota sumária sobre o art. 20º da Constituição. **Revista da Ordem dos Advogados.** p. 531

spaces, and it can be stated that the increase or decrease in Access to the Judiciary can influence the increase or reduction of Access to Rights and vice versa.

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NEO-KEYNESIANISM, NEO-INTERVENTIONISM AND ULTRALIBERALISM: IMPACTS OF COVID-19 ON NATIONAL LAW [1]

Paulo Márcio Cruz[2]
Márcio Ricardo Staffen[3]

INTRODUCTION

This is a contemporary study with the world scenario of the COVID19 pandemic declared by the World Health Organization. Despite the priority for guaranteeing the conditions of prevention of contagion and safeguarding human lives at risk, this article aims to critically analyse the changes and proposals for changes of the National Law of many countries (resulting from the COVID-19 pandemic), within the theoretical frameworks of Neo-Keynesianism, Neo-interventionism, and Ultraliberalism.

As COVID-19 has advanced very quickly across all continents, except for Antarctica, taking advantage of the globalization flows; on March 11, 2020, the World Health Organization had no option but to declare COVID-19 a Pandemic, thus officialising the concrete situation of a global humanitarian, social, health, economic and legal problem. Synchronously, the crisis since the COVID-19 pandemic has become a vector for global-local strategies for the contention and prevention of viral contagion and, on the other hand, for local-global mechanisms of normative, institutional and economic adjustments effective for times of abnormality, changing relevant national public law structures, but with short, medium and long term consequences in transnational scenarios.

Likewise, the ongoing investigation is justified since in recent periods, notably after the election of Donald Trump for the presidency of the United States of America, the political-ideological agenda of greatest influence has highlighted the prevalence of ultraliberal topics, followed since then, by other States in Europe and America. However, the concrete possibility of social degradation, significant impoverishment, falling tax revenues, and economic recession forced leaders of ultra-liberal and non-interventionist orientations to review their political agendas to increase economic and social planning and use of state intervention mechanisms, reviving the public debate on (Neo-)Keynesian and Neo-interventionist postulations. Thus, for comparison

[1] Co-production between researchers from the Centro de Estudos sobre Direito e Transnacionalidade (UNIVALI/CNPq), the Dipartimento di Giurisprudenza (Università degli Studi di Perugia), and Faculdad de Derecho (Universidad de Alicante).

[2] Post-doctorate in State Law from the University of Alicante, Spain, PhD in State Law from the Federal University of Santa Catarina (UFSC) and Master in political and legal institutions from UFSC. Coordinator and Professor of the Graduate Program in Legal Sciences at the University of Vale do Itajaí (UNIVALI). Visiting professor at the universities of Alicante, Spain, and Perugia, Italy. E-mail: pcruz@univali.br

[3] Doctor in Public Law from the Università degli Studi di Perugia (Italy). PhD and Master in Legal Science from the University of Vale do Itajaí - UNIVALI. Researcher at the National Council of Justice (CNJ). Coordinator of the Stricto Sensu Graduate Program in Law - IMED, Passo Fundo / RS. Honorary Professor at the Faculty of Law and Social Sciences at Universidad Inca Garcilaso de la Vega (Peru). Lawyer (OAB / SC). E-mail: staffen_sc@univali.br.

purposes, the actions of the governments of the United States of America, Brazil, Argentina, and Mexico were used due to their ideological proximity (social and ultraliberal) and their participation in the G20, making their reality closer.

Aware of the dynamics of the moment this article was written, it is imperative to express the existence of theoretical legal premises linked to the bases of National Law that must be included in the context of the current crisis of the coronavirus to promote the required critical understanding of its current state-of-the-art. Ignoring the conjunction of these factors implies the loss of analytical, reflective, and critical thinking on the effectiveness, efficiency, and efficacy of the proposals. For this, the inductive method was used for the development of this research, operationalized by category techniques, operational concept, bibliographic research, and analysis of official national reports, transnational indicators, and normative frameworks.

1. LIBERALISM AND THE LEVEL OF STATE INTERVENTION

Contemporary liberalism emerged after the First World War and sought to preserve broad spheres of freedom, but allowing for state intervention in certain areas of society, as can be seen in the 1917 Mexican Constitution and 1919 Weimar Constitution[4].

It was mainly after the advent of the Weimar Constitution that the social-liberal theories based on the integrating success of state interventionism caused the 20th century Liberalism to develop, according to parameters very different from those of the previous century, governed by Smith's principles[5].

The liberal democratic state of the first third of the 20th century was immersed in a profound crisis resulting from the obsolescence of its political structures to adapt to the new social realities. On the other hand, the proletarian movement, which gained momentum with the Russian Revolution, was pressing for individual freedoms and rights to have the company of collective rights. Finally, the unfolding of the greatest crisis that capitalism had suffered, in 1929, implied abandoning policies based on the classic liberal parameters of non-intervention.

Some countries have faced the crisis of the liberal democratic state by replacing it with military or civilian dictatorships, or by totalitarian states, while, from a liberal perspective, other states have embarked on a decided path of expanding political representation, social reformism – taking over the social rights - and redistributive interventionism.

The main creator of this direction was the English economist John Maynard Keynes[6] (1883-1946) who, *"although liberal in politics, advocated a managed economy, trusting in the benefits of*

[4] PASOLD, Cesar Luiz. **Função social do Estado Contemporâneo**. 3 ed. Florianópolis: OAB/SC Editora coedição Editora Diploma Legal, 2003.

[5] SMITH, Adam. **A Riqueza das Nações**: Uma Investigação sobre a Natureza e as Causas da Riqueza das Nações. São Paulo: Madras, 2009.

[6] JOHN MAYNARD KEYNES, an English nobleman and economist, born in Cambridge in 1883, died in Sussex in 1946, was an advisor to the British Treasury during the First World War. After the war, he published the study The Economic Consequences of the Peace (1919). Author of Treatise on Money (1930) and, later, The General Theory of Employment Interest and Money (1936),

the planning action of state bodies[7]*"*. Keynes becomes the most influential Western author, as he proposes a theory of economics that would provide the economic bases for development capable of sustaining redistributive social policies. Keynes was able to convince the Western dominant social groups that the best way to contain the proletarian movement and stabilize the system would be to reform the system possibly and gradually.

The use of Keynes's theories meant the end of the classic economic liberalism and its replacement by mixed economies, in which the State started to play a decisive economic role in reactivating the economy through public investments, correcting the dysfunctions of capitalism, preventing another "1929 Black Friday" and redistributing income through a progressive tax policy aimed at eliminating extreme inequalities and activating demand[8].

Keynes synthesized his liberal political reformist thinking by stating that humanity's political problem requires changing three ingredients: Economic Efficiency, Social Justice, and Individual Freedom. The first, economic efficiency, needs criticism, caution, and technical knowledge. The second, generous and enthusiastic spirit that loves the common person. The third requires tolerance, breadth of objectives, valuing the excellence of independence and variety, offering opportunities without any kind of obstacles to those who are exceptional and have aspirations. Social justice is the greatest achievement of the proletariat, but the economic efficiency and individual freedom need the qualities of the party that, due to its tradition and affinities, was the home of Economic Individualism and Social Freedom.

After his election in 1932, Roosevelt and his New Deal policy, which was unquestionably interventionist, aimed to alleviate the enormous social costs of the 1929 crack and to relaunch the United States economy according to premises based on criteria of reformist Liberalism[9]. This was done so intensely that in the United States, "liberal" is synonymous with the left and opposed to conservative, which indicates the right-wing political trend. Being reformist, this view aimed to democratize liberal societies, respecting their basic characteristics, such as the proclamation of individual rights and freedoms, separation of powers, political participation of citizens - constantly expanded - and the principle of legality provided for in the Constitution.

Between the end of the Second World War and the beginning of the seventies, in all Western countries with democratic regimes, there is one consensus called by Dahrendorf[10] the social-liberal pact. This pact is among all major political forces in the application of the so-called

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KEYNES attacked the problem of underemployment that existed in England after the 1930s. He saw, in this situation, a state of permanent under-equilibrium that no automatic market mechanism would correct. KEYNES preached a consequent increase in consumption, low-interest rate, growth of public investments, measures that implied the intervention of the State. He played a very important role at the Bretton Woods Conference in 1944.

[7] REALE, Miguel. O estado democrático de direito e o conflito das ideologias, 3 ed. Editora Saraiva, 2005, p. 30.

[8] ANTÓN, Joan et alii. **El liberalismo**. Madrid: Tecnos, 1996. p. 202.

[9] DALLARI, Dalmo de Abreu. **Elementos de teoria geral do Estado**. Saraiva, 1985. p. 236.

[10] DAHRENDORF, Ralf. **O conflito social moderno**: um ensaio sobre a política da liberdade. São Paulo: Jorge Zahar Editor/USP, 1992.

welfare state policies, which reached its broadest development in countries where the social democratic parties, which renounced Marxism, were able to govern for more than a decade[11].

This welfare state, whose philosophical root remains utilitarian, proposed the greatest happiness for the greatest number of people, nuanced by the social-liberals in the socialist sense. This consensus is broken by the exhaustion, in the late sixties, of the Keynesian model. With the crisis of the Welfare State, from the seventies onwards, there is a return of liberal theses that already seemed to be overcome, proposing a radical questioning of the basic conceptions of state interventionism and the return to Liberalism.

These neoliberal conceptions have caused and cause great academic and political debates. The author who has most radically promoted this questioning is Nozick, who proclaims that only a minimal state is legitimate and moral, one that protects the individual and makes sure that private contracts are fulfilled. Granting greater powers to the State means violating individual rights, and should be avoided[12].

Nozick's greatest opponent is Rawls[13], who also rejects utilitarianism and defends individual rights by linking them to the common good. Touraine points out that Rawls ceaselessly works with Rousseau's individualism and contractualism, in a position ahead of that of many contemporary liberals[14]. So much so that Rawls[15] understands the Constitution as having regulatory capacities far beyond those admitted by less contemporary liberalisms[16]. He states that a well-organized constitution includes democratic procedures for dealing with emergencies. Therefore, in terms of constitutional doctrine, the priority of freedom implies that free political expression cannot be restricted, unless it can reasonably be argued, based on the specific nature of the situation at hand, that there is a constitutional crisis in which democratic organizations are unable to operate effectively, and in which their procedures for dealing with emergencies do not work[17].

Neoliberalism would be closely related to neoconservative political trends that provided doctrinal and ideological coverage to the conservative governments of the eighties, whose prototypes were Pinochet's Chile, Thatcher's Great Britain and Reagan's United States. The core of its political proposals was to put an end to social protection by the State and gradually eliminate the mechanisms of income redistribution, in addition to deregulating the labour market, privatizing the public sector and allowing free market laws regulate the economic life of the Society.

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[11] ANTÓN, Joan et alii. **El liberalismo**. Madrid: Tecnos, 1996. p. 203.

[12] NOZICK, Robert. **Anarquia, Estado e Utopia**. Tradução de Fernando Santos. São Paulo: Martins Fontes, 2011.

[13] RAWLS, John. **Teoría de la justicia**. Tradução de de María Dolores González. México: Fondo de Cultura Económica, 1995.

[14] TOURAINE, Alain. **O que é a democracia?** Editora Vozes, 1996. p. 170.

[15] RAWLS, John . **O liberalismo político**. 2. ed. Trad. Dinah de Abreu Azevedo. São Paulo: Ática, 2000.

[16] STAFFEN, Márcio Ricardo; ZAMBAM, Neuro José. **Direito global e desigualdades**: um estudo a partir do "direito dos povos" de John Rawls. Revista Eletrônica do Curso de Direito da UFSM, Santa Maria, RS, v. 10, n. 1, p. 243-258, out. 2015.

[17] RAWLS, John . **O liberalismo político**. 2. ed. Trad. Dinah de Abreu Azevedo. São Paulo: Ática, 2000. p. 411.

In this way, it is said that more wealth would be created, it would be profitable to invest, the subsidy culture would end, individuals would be motivated and more social wealth would be generated. Obviously, regardless of social costs and the increase in inequalities that all this supposes. Inequalities and poverty that increased during the years of Thatcher and Reagan.

At that time, the old liberal-conservative recipes in the face of the problem - and the crisis - of the societies that opted for the Western Welfare State, whose Keynesian model went into crisis or, at least, started to need revision. Revisions were required due to the constant and increasing pressure of the Society demanding for more and better services to the point of exhausting the political and economic capacity of what is, in the opinion of neoliberals, an excessively bureaucratic and ungovernable system, which is sustained by atomization of productive agents, with an inexorable logic of individual action, in contradiction with the guidelines oriented to the Common Good of state policies[18].

Contemporary liberal authors belonging to the most advanced trends of Liberalism defend that the objective of freedom is to achieve authentic equality of opportunities or vital chances for each individual, already in a conception that is very close to the Welfare State seen through the neoliberal lens. They are ideas generated from conceptions that the full realization of individuals, which at first do not presuppose or prioritize any conception of Welfare, would meet criteria established by consensus among the various economically active social segments, regarding the social justice.

2. THE REVIVAL OF KEYNES POSTULATES

It can be said that after Smith and Malthus, economists of the classical school, and Marx, no other theorist was as important as Keynes, an influent thinker in the renewal of traditional economic theories and the reformulation of free market economic policy. Keynes, mainly with the publication of his famous The General Theory of Employment, Interest and Money overcomes for the first time and decisively the interpretation of the liberalist Economic Policy. The need to leverage economic growth and the extension of greater well-being for the entire Society are considered inseparable principles that are linked to the increasing intervention of the State and that are unequivocally linked to Keynes.

In a systematic reading of Keynes's postulate, it is possible to say that he defended his concept of multiplier effect as being the rule by which the increase in government expenditure increases aggregate demand, which would create an optimization of labour and capital in a such a scale that production would expand at a higher rate than the growth of those expenditures. Considering these analyses, it can be said that the Keynesian model supports the possibility of converging market and social elements through the articulation of redistributive policies

[18] ANTÓN, Joan et alii. **El liberalismo**. Madrid: Tecnos, 1996. p. 204.

In a historical perspective, it seems evident that Keynes's preaching of a model that sought to promote the combination of resources between the market and the State, became, until the end of the seventies, an economic doctrine that almost nobody questioned, as its defense was closely related to the construction of the Welfare State and allowed it to enjoy a broad consensus. Keynes's work was fully recognized in his later years. In 1944, he headed the UK delegation to the Bretton Woods Conference in the United States.

The Keynesian model, regardless of its theoretical consistency, had several elements that helped to make it unanimous in the most diverse social and ideological sectors. One of the most visible expressions of this fact was the disappearance of disputes between the social classes that convulsed capitalist societies in the periods before World War II. This disappearance can be attributed to two factors: a) the economic growth that Western societies experienced from the fifties; and b) the extension of social welfare to increasingly broad layers of society.

The Welfare State came to enjoy an enormous degree of consensus, as did the Keynesian economic policies. In the two decades following World War II, there was a feeling that, in fact, the consolidation and expansion of the Welfare State actually took place in a period that could mean the end of the ideological confrontation between left and right or between freedom and equality. The course of events, however, showed the misunderstanding of this perception.

Authors such as Blas Guerrero and Pastor Verdú, when addressing the welfare state crisis, teach that in the early eighties, the phase of economic prosperity that started after World War II came to an end, due to two striking facts. The first of them was the decision of the United States not to maintain the convertibility of the dollar into gold, a decision made due to the amount of the US currency in circulation in other countries. The economic problems caused by this decision lasted from the mid-seventies to the beginning of the eighties. Faced with this new economic reality, Western countries began to have serious difficulties to continue implementing their economic policies based on the Keynesian model.

However, it should be noted that the economic crisis was not the only one responsible for questioning the Keynesian model. The second striking fact was the uncontrolled growth in public spending. It is worth remembering that this fact remains one of the major problems of countries like Brazil, which are debating between assuming a late Social Democracy or controlling public deficit, tax burden and the non-intervention of the State in fundamental sectors, mainly the social one.

Election processes undermined the rationale on which Keynes's proposal was based. The adoption of social policies that would expand public and free care, even with the growth of public spending, would have less political costs than raising taxes, something that would be possible in a context of high and sustainable economic growth, but not in a recession. In addition, there was a depletion of the State's capacity to invest in new productive structures, which, at most, maintained those already in existence.

The criticisms from the more conservative sectors had already highlighted this issue. Neoliberalists started to point out that the Welfare State, instead of contributing to economic growth, would be stagnating the economy by not subjecting public services to stimulating competition. In addition, very high taxes reduce industrial investments. Governments began to have to live with the contradiction of maintaining the high costs of the welfare state and increasing the tax burden or reducing public investments that benefited thousands of people. In any of these situations, unpopularity and possible electoral wear and tear were ever-present ghosts. The strong objections to the “Keynesian consensus”, the limitations of the Fordist model and the constant and growing presence of the State in all social spheres are some of the components that explain the emergence of new theories about the ideological organization of the State, still in an incipient way, mainly the emergence of the so-called Neoliberalism.

From the late seventies onwards, these factors caused a simultaneous growth of the economic recession and inflation, creating a radically new situation, baptized by the economists on duty with the neologism "stagflation”. This shook the Keynesian theoretical construction as one capable to respond to crises. The combination of inflation and recession was new and not easy to solve using Keynesian formulas.

State intervention to regulate the economy, which had been the typical practice of the Keynesian model to cope with the growth of stagnation or inflation, respectively, proved to be ineffective when faced with the simultaneous increase in both indicators. Tax imbalance and the increase of the recession and unemployment, which were mainly seen during the seventies and eighties, made the proposal of Welfare State even more vulnerable. In the 50s and 60s, during the 20th century, unemployment in England remained low, between 1 and 2%. It began to rise in the 1970s, oscillating between 4 and 6% in the late 1970s. The historic agreement between the Labour party and the unions, which was intended to reduce unemployment, curb inflation and renew the economy, was broken in 1978-79. The consequence was the conservative electoral successor under Thatcher.

The new orientation was that governments should not keep policies aimed at full employment, as this would create undesirable effects, such as increased inflation and decreased productivity. Even so, the ideological and political basis of the Welfare State survived during the conservative and neoliberal wave that hit Western civilization during the 1980s. The main universal services - income maintenance, health care and education - survived the neo-conservative movement in Western Europe, with relatively small troubles.

At first, the evolution in doctrinal discussions on the relationship between the Rule of Law and the Welfare State was seen in authors who sought to justify the State intervention as a way of updating the Liberal State. The path followed was one that started to defend that State regulation and intervention were adequately provided they represented the provision of essential public services and the maintenance of public investments aimed at moving the capitalist gear and strengthening the market.

Following this reasoning and considering that the individual would be dependent on the benefits of the State, the main problem would be to ensure that the State did not move to an arbitrary position in the management of public social services and its intervention in the economy. Thus, the theses of the legal reserve and the democratic regime became essential to the control of state activity.

From this position came the most advanced one, which considered the Social State of Law - or the Rule of Law Welfare State - an adequate position for the complex societies that were emerging. These societies started to demand an increasing intervention of the State. The idea that a minimum of State would correspond to a maximum of freedom became outdated or old-fashioned. From that point of theoretical inflection, an interventionist Welfare State came to represent the Rule of Law more conveniently, since the concept of freedom was no longer linked to property and individuality at any cost, and became closely linked to the individual's social condition. A person would only be free if he or she had the least social opportunities.

There was a kind of replacement in the concept of freedom, with property being replaced by Welfare as a condition for the individual to be free. In this sense, one can use a concept of State that combines Welfare and Democracy as a synthesis for the thesis of state intervention. This type of state points to a balance between the two concepts - the rule of law and the social state - because freedom is inconceivable without a high degree of solidarity and social equality, and, on the other hand, social progress, economic development and the protection of the most disadvantaged classes must be based on respect for the constitutional rule of law.

3. STATE INTERVENTION THROUGH PUBLIC LAW

Since the emergence of the Constitutional State, the fundamental objectives of constitutional texts have been the regulation of political power and the guarantee of citizens' freedom from this power. The express aim of constitutions was not then, until relatively recently, to provide for State intervention, in detail, according to the economic order established for the Society. Referring to those political letters, Bonavides adds "their essence will be exhausted in a mission of total alienation and absence of intervention in the economic and social arenas".

It was only at the beginning of the twentieth century that constitutions began to foresee, with some intensity, intervention in relevant aspects of economic life. From 1936 onwards, the theory of the English John Maynard Keynes, exposed in the work The General Theory of Employment, Interest and Money, has undergone a doctrinal boost. Keynes's thought introduced the then revolutionary idea of the need for more or less permanent intervention by public authorities in the economy into Economic Science.

However, it should be noted that constitutionalism had consequences for the economic order much earlier, even if it was not some kind of intervention. All of these aspirations led to an economic model that left the individual free to relate economically to others and that allowed him/her to define, without State interference, what his/her interests were.

These aspirations were reflected, in part, in the texts of precursory constitutionalism. The Declaration of Independence of the United States of America has, as one of its arguments, the unjustified action of the King of England cutting off the trade of his colonies in North America with other nations and to establish taxes without the consent of the citizens of these colonies. The 1789 Declaration of the Rights and Duties of Man enshrined property as an inviolable and sacred right, considering it a “natural and imprescriptible right of man”.

State intervention in the economic, social and cultural domains foreseen in the constitutions of the 20th century corresponds to a mainly programmatic movement. The economic and social order during the first phase of positive acceptance of the principle of the social state in the constitutions of the 20th century corresponds largely to a programmatic agenda. After World War I, social demands and the strengthening of organizations from the most disadvantaged social sectors, represented by the labour, socialist and communist parties, leveraged the movement for the effective constitutionalisation of state interventions in economic and social life. The path of insisting lies not on defending the "free personality development", anchored in property and against state interventions, but on defining the contours of the "free personality development" based on the state benefits themselves.

It was during this period that the expression Welfare State was forged, inspired by Heller[19] as an indication of a model of public intervention that guaranteed not only freedom, but also an adequate social and economic conditions for citizens[20]. The constitutions approved in the second post-war started to admit, expressly, a relevant role of the State in the configuration of the economic and social order. The insertion of the Welfare State in the Rule of Law translates a movement that imposed on the contemporary State its interference in the private domain, that is, in the social whole.

From this moment on, the inclusion in the constitutional documents of clauses dedicated to including the State intervention in the most diverse aspects of economic and social life has become a characteristic common to many countries. These clauses focus mainly on the regulation of relationships between individuals. The most current example is that of consumer codes, designed to regulate private consumer relations; another example are the regulatory frameworks of the internet.

It is important to note that regulation and intervention are different categories. The intervention of public authorities as economic agents, directly producing or selling products and goods or providing services typical of the private sector is what characterizes State intervention in the economy.

[19] HELLER, Hermann. **Teoria do Estado**. Tradução de Lycurgo Gomes da Motta. São Paulo: Mestre Jou, 1968.

[20] CRUZ, Paulo Márcio. **Parlamentarismo em Estados Contemporâneos:** os Modelos da Inglaterra, Portugal, França e Alemanha. 1. ed. Itajaí: Editora da Universidade do Vale do Itajaí, 2000.

4. COVID-19: A SHIFT TOWARDS NEO-INTERVENTIONISM AND NEO-KEYNESIANISM

For various political, ideological, economic, legal and social reasons, the course of the past two decades has marked a strong tension between primacy of liberalism and the need for state intervention through public law in private matters and spheres. However, it was the economic crisis of subprime mortgages, caused by the bankruptcy of Lehman Brothers Holdings Inc., in 2008, that the respective regulatory claims were projected to global spheres[21]. If previously the clashes between defenders and opponents of state intervention were segmented in national nuclei, since then, the mentioned confrontation has gained transnational projections, taking place in both "strong" States and "weak" States[22]; both in banking sectors and in commodities. The episode of the 2008 crisis, marked by a clear state intervention in the economy, showed the impotence of the liberal-economic-financial system to dominate the society as a whole. While neoliberalism has revealed fissures and insufficiencies in the entities of social representation, the 2008 crisis shed light on the structural failure of the neoliberal notion that envisioned the society's domination of production, accumulation and conflict around the appropriation of the gains of productivity[23]

Such idiosyncrasies influenced the political debate from 2010 onwards. Presidents, prime ministers and namesakes were elected/ chosen in a scenario of strong political tension over liberalism (some with superlative appeal, as in the case of Trump and Bolsonaro), and some others managed to channel agendas of greater dirigism and state intervention (represented by López Obrador and Alberto Fernández), using, for the purpose of a more precise comparative cut, American heads of state that integrate the G20. However, the emergence of the consequences of the planetary contagion of COVID-19, which began in January 2020, and the subsequent declaration of Pandemic by the World Health Organization prompted an abrupt turn in the manifestations of ultraliberalism, neo-interventionism and the revival of Keynes' model.

The COVID-19 Pandemic Declaration served as a catalyst for agendas related to Society, State and Economy to share spaces on governmental, national and/ or transnational agendas, beyond health and epidemiology. If before the emergence of COVID-19 the world was already aware of the slowdown in Chinese growth, with the downturn in commodity prices, US taxation policies, fall in oil prices/ demand and expansion of indices of unemployed and/ or underemployed, and rise of the dollar, the pandemic combined a scenario of recession and the need for state intervention and proactivity. Thus, part of the policies presented as responsive to the Pandemic, in fact, seek to resolve pre-existing economic and regulatory non-conformities.

Argentina, Brazil, the USA and Mexico, at the same time, published ordinary and/ or emergency normative acts to face the crisis generated by COVID-19. Also within the context of an

[21] CRUZ, Paulo Márcio; FERRER, Gabriel Real. A crise financeira mundial, o estado e a democracia econômica. **Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito**, v. 1, p. 46-56, 2009.

[22] According to the terminology used in: KHANNA, Parag. **Como governar o mundo**: um roteiro para o próximo renascimento. Tradução de Berilo Vargas. Rio de Janeiro: Intrínseca, 2011.

[23] TOURAINE, Alan. Após a crise. A decomposição da vida social e o surgimento de novos atores não sociais. Petrópolis: Vozes, 2011. p. 20-25.

epidemiological and medical emergency, these governments focused on actions of state neo-interventionism on the economic activity, making use of public law procedures. Thus, by promoting economic intervention, the aforementioned States, whether liberal or not, have implemented Keynes' postulates, seen in mechanisms related to full employment, control of inflation and substantial State intervention in the economy

Argentina, Brazil, the USA and Mexico, using multiple ways, broke with the epistemological basis of economic liberalism and with the neoliberalism created in Bretton Woods and in the Chicago School when, at the start, they ignored their respective public spending limits and public debt limits. In Brazil, in particular, the publication of Legislative Decree no. 06, on March 20, 2020, which recognizes public calamity under the terms of Complementary Law no. 101/2000, imposes a move away from the guidelines of the current government's economic portfolio, abandoning the ongoing notion of ultraliberalism. In the same context, reference should be made to the granting of extraordinary credit to the Ministry of Economy of R$ 51,641,629,500.00, according to Provisional Measure 935, of April 1, 2020.

At the same time, the said States have introduced permissions to grant extraordinary credit, manage credit risk operations and restructure credit operations, intervening to allow greater fluidity of financial assets to legal entities and individuals, including in the banking system, functions that transcend frame of caution and ballast. Specifically Brazil, through Resolution no. 4,782, of March 16, 2020, from its Central Bank, faced the issue of "problem assets", promoting clear interventionism. Meanwhile, the American Federal Reserve reduced the interest rate to zero to induce the contracting of credit and the circulation of currency in the most diverse social strata, and actually reconfiguring the notion of loan to the idea of transfer of liquidity, similar to that defended by Amartya Sen (2010).

When considering full employment, the central pillar of the Keynesian proposal, the neo-interventionist policies of the abovementioned States to deal with the crisis arising from the COVID-19 Pandemic, focused primarily on the preservation of formal ties, aiming at curbing indicators of unemployment and lack of occupation. In this scenario, the proposals of the Brazilian government that prioritized the preservation of employment contracts at the expense of the maintenance of income standards, are highlighted, as observed by the wording given to Provisional Measures 927 (published on March 22, 2020), 928 (published on March 23, 2020), and 936 (published on April 1, 2020).

All these Provisional Measures entered a clear space of intervention, through Public Law, in private initiative and free initiative, through dirigism and interventionism. However, Brazil opted for more lenient ways than those published by the American and Argentine governments, which demanded the maintenance of formal ties and agreed remunerations. In the case of Argentina, unmotivated dismissals and suspensions of employment contracts were prohibited for a period of sixty days (Decree 329, of March 31, 2020). The American government, on the other hand, adjusted the sending of a government check in the amount of one thousand dollars to meet the

basic needs of the population, which in two weeks ended up reaching more than ten million new unemployed[24].

In different ways, the States under consideration sought to preserve employment mechanisms through the maintenance of formal contracts as a strategic economic indicator and, on the other hand, to create minimum income models at the time of crisis and on the eve of economic depression. Thus, in line with neo-interventionism, with a Keynesian bias, they aim to safeguard subsistence, keep the capitalist gears of consumption in operation and signal rationality and clarity to the market.

An identical purpose is observed in dealing with emergency strategies for the preservation of entrepreneurial activities of small businesses and/ or with a differentiated tax regime. With the argument of maintaining activities and jobs, special lines of credit were granted, with more relaxed tax obligations and less bureaucracy (Resolution 152, March 18, 2020 and Provisional Measure 932, March 31, 2020). Argentina, Brazil, the United States and Mexico, each by their own means, have established Keynesian guidelines to distribute economic incentives among self-employed workers, self-employed professionals and individual entrepreneurs, whether through social security or minimum income for the family group.

However, while such measures may flirt with neoliberal precepts, the constraints placed on such protective mechanisms and the counterparts regarding the election of strategic sectors for the State, signal a hypothesis of neo-interventionism. In that sense, President Trump's behaviour is self-explanatory when he imposes on General Motors the duty of production planned by the State of essential products, according to the Defense Production Law, passed in 1950, in contrast to the neoliberal primer. Along similar lines, even after the publication of Provisional Measure no. 881, of April 30, 2019 (Law of Economic Freedom), there is a distancing from the neoliberal guidelines, for example, in the case of the request for intervention in a private hospital network in São Paulo due to the high number of deaths by COVID-19.

In addition to the aforementioned cases, one cannot ignore the broader panorama of neo-Keynesianism and neo-interventionism gathering political-economic models of liberal or social orientation during the COVID-19 Pandemic that go beyond the limits established by the rules of tax responsibility and countries inject extraordinary amounts of their revenues for public health care and economic dynamics. Trump's ultraliberalism injected a $ 2 trillion dollar economic package, when the 2019 GDP registered $21.4 trillion (approximately 9.9% of the GDP invested in intervention and public policies). The Brazilian followers of the so-called Chicago School, against interventionism, whose ideas are the majority in the adoption of economic policies in the Bolsonaro government, promise to inject up to R$ 700 billion, for a GDP of R$ 7.3 trillion, with the

[24] LONG, Heather. Over 10 million Americans applied for unemployment benefits in March as economy collapsed**. The Washington Post.** Retrieved from https://www.washingtonpost.com/business/2020/04/02/jobless-march-coronavirus/?hpid=hp_hp-top-table-high_banner-hed%3Ahomepage%2Fstory-ans&itid=hp_hp-top-table-high_banner-hed%3Ahomepage%2Fstory-ans on Apr 2 2020.

edition of Amendment to the Constitution pending. Argentina announced a budget of approximately $450 billion Argentine pesos, with a GDP of approximately US$ 600 billion. Just as a comparison, Peru, also liberally oriented, announced the release of an amount equivalent to 12% of its GDP (US$ 25 billion) to aid the economy[25].

Therefore, due to the widespread allocation of public resources, treasuries that have already been in deficit or recovery, propose legislative measures that aim to re-discuss tax regimes, sources of collection and structural reforms. In Brazil, this is the case of Bill no. 924/2020, which aims to regulate the tax on large fortunes, provided since 1988, in the Federal Constitution. In this way, a new flank of state intervention in the economy opens up, mischaracterizing the political and economic agenda of the minimal state and ultraliberalism previously underway.

CONCLUSIONS

The scenario unveiled since the COVID-19 pandemic, especially when it arrived at the Western countries, forced a turn by States and their governments towards emergency and exceptional measures for the contingency of epidemiological, social, economic and legal crises. Thus, regimes were ultraliberalism was increasing had to change assumptions towards patterns of neo-interventionism and the adoption of a new understanding of Keynes's postulates - hence Neo-Keynesianism.

In the span of a week, especially in the scenario of America, the antagonism between ultraliberal governments and governments of greater dirigisme and intervention was overcome to establish mechanisms of direct state action in the private sector and public policies against budget control policies, pro employment and the creation of minimum incomes, the about turn by Trump being emblematic, with measures of a larger scale than the New Deal. It is also noticeable the clear and unequivocal option that these governments have for state intervention mechanisms, invoking attributes of sovereignty to marginalize soft law, self-regulation and or regulation mechanisms. Thus, from health policies to labour relations, they have become central again.

However, while the effectiveness of the measures taken is still under assessment, due to time passing and the highly volatile social dynamics, it is necessary to consider that the return to Keynes, either through Neo-Keynesianism or the more conservative version of his postulates, it is necessary to consider the following variables, especially in the case of Brazil: a) the significant level of deficit of public budget, which might now exceed 200 million Reals; b) the increase in taxes tends to impact on the productive and commercial attractiveness of the country, generating side costs that will harm the competitive environment; c) the present political and ideological polarization that hinders the government's dialogue with its citizens, hindering mutual negotiations and concessions; d) the democratic control of intervention measures, so that they do

[25] Data from the government websites mentioned, retrieved in the period from 31/03 to 03/04/2020.

not become excessive authoritarianism and arbitrariness and; e) transparency in the management of the means of intervention and economic direction by public law institutes.

Finally, in an emblematic way, the condition of the effectiveness of the intervention measures of a Keynesian nature is not based only on the amount of currency put into circulation by the national treasuries herein discussed. It is a sine qua non condition that Public Law is properly managed to optimize proactive actions by these Governments, in line with the real demands during and after the COVID-19 Pandemic to maintain income, employment conditions, capitalist production and consumer flows of the country. Otherwise, unmanageable deficits, unemployed ranks and staggered bankruptcy successions will be boosted. More than ever, episodes related to COVID-19 demand the duty of states to provide assistance and interventions.

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AGREEMENT ON RESIDENCE FOR NATIONALS OF THE STATES PARTIES OF MERCOSUR: INNOVATION IN IMMIGRANTS RIGHTS IN BRAZIL?[1*]

Luciene Dal Ri[2]
Aline Beltrame de Moura[3]

INTRODUCTION

Mercosur (Southern Common Market) was born with the primary objective of strengthening economic cooperation between the interested States in increasing their presence in the international economy. However, the delimitation of the activity only in the economic sphere has proved inadequate concerning the intention to guarantee a better quality of life and eliminate discriminations and social exclusion.

Therefore, the need to establish a model that would also take into account the social aspects of the people united by the Treaty of Asunción arose.

In this context, the creation of the Residency Agreements for the nationals of the States Parties to the Mercosur of 2002 presents an advance in integrating the Mercosur peoples and the legal status of foreigners. The reception of one of these agreements by Brazil evidenced the expectation, at the national level, of expansion of rights and greater humanization to the treatment of the Mercosurian foreigner, following the perspective that the expansion of rights would occur more through international treaties than the national construction of rights.

This perspective does not consider that Brazil was, during the second half of the nineteenth century and the first half of the twentieth century, one of the countries of great reception of immigrants. However, the dictatorial regimes of the twentieth century have developed restrictive integration and immigration policies, which are largely national security-oriented; historically, national constitutions ensure individual and social rights to foreigners.

In this context, this chapter intends to compare the rights provided for in the Agreement on Residence for Nationals of the States Parties of Mercosur (2002) and those provided by the national legal order, particularly by the Brazilian Federal Constitution (1988). The objective is to verify to what extent the Agreement on Residence innovates concerning the Brazilian legislation

1 The research base of this chapter was partially published through the article "os direitos dos imigrantes mercosulinos no Brasil: entre a constituição federal de 1988 e o acordo sobre residência do mercosul". Revista Culturas Jurídicas, v. 7, 2020. Available at http://www.culturasjuridicas.uff.br. 04Nov.2020.

2 Professor at Master's and Doctoral Program in Legal Science at the University of Vale do Itajaí. Ph.D. in Law from Università degli Studi di Roma - La Sapienza; E-mail: luciene.dalri@univali.br. ORCID: 0000-0001-5245-4467. This chapter is part of the Master's and Doctoral Program's research activities in Legal Science, UNIVALI, which focuses on the Fundamentals of Positive Law, specifically in the research Constitutionalism and Law Production line in the research group State, Constitutionalism and Law Production.

3 Professor at Master's and Doctoral Program in Law at the Universidade Federal de Santa Catarina. Ph.D in International Law from Università degli Studi di Milano, Itália. Coordinator of the Center for Research in Private International Law UFSC/CNPq. Coordinator of Jean Monnet Network "Building RIghts and Developing KnowledGE between European Union and Latin-America - BRIDGE" and of Módulo Jean Monnet CCJ/UFSC. ORCID: 0000-0003-0867-3560.

and in which situations it simply repeats dispositions already enshrined not only in the Constitution but also in the doctrine and the national and international jurisprudence.

1. THE AGREEMENT ON RESIDENCE OF THE STATES PARTIES OF MERCOSUR

Mercosur's intention to integrate Latin America's peoples occurs not only in economic terms, but it expands to the political, social, and cultural aspects. It implies minimizing the differences between the nationals of the various Latin American people to what is essential for the safeguarding of each of the integrated people.[4]

Making the consolidation of the social dimension at a regional level possible, the Agreements on the Residence for Nationals of States Parties of Mercosur[5] were signed during the 23rd Meeting of the Common Market Council[6]. It provides foreigners' fundamental rights and the adoption of differentiated procedures facilitating the granting of residence authorization for nationals of States that have ratified the document.

The Agreements are, therefore, instruments available to Mercosur States Parties to solve the migratory situation of nationals of States Parties and Associated Countries and strengthen the ties that unite the regional community. They provide for immigrants' rights and their family members to equal civil rights, family reunion, equality of treatment with nationals regarding the application of labor and social insurance legislation, the commitment to enter into reciprocal agreements on social security matters, the right to transfer resources, civil and educational rights of the children of immigrants.

The importance of the Agreement on Residence is confirmed by the subsequent approvals of the applications for membership submitted by Peru[7] and Ecuador in 2011[8] and by Colombia in 2012[9]. Venezuela is the only country that has not yet ratified such a document. Thus, the Agreement on Residence for Mercosur Citizens is currently in force in four Member States and all Associated States, totaling nine countries, whose beneficiary population is around 500 million people.

The Agreement on Residence is, in fact, an authentic international instrument insofar as it was elaborated and signed by the Heads of State and Government. Only with the Decision of the

4 LOPES, Cristiane Maria Sbalqueiro. **Direito de imigração**. O estatuto do estrangeiro em uma perspectiva de direitos humanos. Porto Alegre: Nuria Fabris, 2009, p. 469.

5 It should be pointed out that there are two Agreements on Residence for Nationals of Mercosur Member States, of identical content but with different Contracting States. The first was signed only by the founding Member States of Mercosur; the second was also attended by Bolivia and Chile, both Associated States. For an in-depth analysis on the theme see: Moura, A. B. de. (2015). A criação de um espaço de livre residência no Mercosul sob a perspectiva teleológica da integração regional: aspectos normativos e sociais dos Acordos de Residência. **Revista de Direito Internacional**, 12, 630-648.

6 Meeting held in Brasilia, Brazil, between December 5 and 6, 2002.

7 Peru decided that the agreement should enter into force on the same date as the signature of the act of adhesion to Decree CMC no. 4/11, on June 28, 2011.

8 Ecuador signed Decree CMC no. 21/11 on June 28, 2011 and decided the agreement should enter into effect after ratification by the Ecuadorian National Assembly, held on December 3, 2013.

9 Similarly to Peru, Colombia decided that the agreement should enter into effect on the same date as the signing of the act of adhesion to CMC Decree no. 20/12, on June 29, 2012.

Common Market Council (CMC) n. 28/02[10] the incorporation of the aforementioned Agreement took place and, thus, the international norm actually became derivative law of Mercosur. It is important to recall that, given the intergovernmental nature of the bloc, the CMC Decisions are, as a rule, non-binding and need to be subject to the incorporation procedure in each State Party in order to become effective.[11]

In the Brazilian legal system, the Agreement on Residence should be understood as a special law, as it regulates the residence of foreigners from specific countries, acquiring 'supralegal' *status*.[12] According to the Regional Federal Court-3, Interlocutory Appeal 502436 – reporting judge Roberto Jeuken, judged on June 4, 2014, the understanding of jurisprudence is: the Agreement on Residence for Nationals of the States Parties of Mercosur, Bolivia and Chile, who joined the Brazilian legal order through Decree n. 6969/2009 is presented as a special (or even supralegal) rule in the face of the Foreigner Statute, in order to regulate a specific situation, residence, of foreigners coming from specific countries, namely, MERCOSUR, Bolivia and Chile members, being also certain that the provisions of paragraph 2, Article 5 of the 1988 Federal Constitution, agreements such as this one ensure fundamental rights and guarantees, with its provisions having, therefore, the same hierarchy of other rules of that article.[13]

Thus, at the same time that the Agreement respects the Federal Constitution, it also positions itself as a special rule and above ordinary legislation, overlapping with the Foreigner Statute and the new Migration Law, concerning foreigners covered by the Agreement, this is, to the citizens of the signatory States of Mercosur. The Migration Law also provides that its content does not prejudice treaties in effect in Brazil that are more beneficial to the migrant and the visitor, in particular treaties signed within Mercosur's framework.[14]

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[10] Decree CMC no. 28/02 of December 6, 2002.

[11] SALZMANN, Antonio Cardesa. El contenido jurídico de la libre circulación de personas en el Mercosur: balance y perspectivas. In: GOIZUETA VÉRTIZ, Juana; GÓMEZ FERNÁNDEZ, Itziar; PASCUAL GONZÁLEZ, María Isabel. **La libre círculación de personas en los sistemas de integración económica: modelos compara¬dos: Unión Europea, Mercosur y Comunidad Andina.** Navarra: Thomson Reuters Aranzadi, 2012. p. 169. In the face of Paraguay's delay in ratifying the Agreement on Residence, the other Member States began to apply it bilaterally through the exchange of instruments of ratification: this occurred after April 3, 2006 between Argentina and Brazil; after July 20, 2006 between Argentina and Uruguay; and after October 23, 2006 between Brazil and Uruguay. The Agreement on Residence for Nationals of the States Parties, as Mercosur standards, entered into effect for all Member States only on July 28, 2009, after the deposit of the ratification conducted by Paraguay. In Brazil it was incorporated by Decree no. 6,975 on October 7, 2009.

[12] Law 13,445/2017, art. 111 says that this Law does not prejudice rights and obligations established by treaties in effect in Brazil that are more beneficial to the migrant and to the visitor, in particular treaties signed within the Mercosur. Regarding the conflict between international treaties and norms of the Brazilian legal system, see DOLINGER, Jacob. **Direito internacional privado**: parte geral. 8. ed. Rio de Janeiro: Forense. 2005. Regarding the incorporation of international standards into the Brazilian legal system, see: DAL RI, Luciene. Costumes e Acordos internacionais versus Constituição. In: SOARES, Josemar.; SANTOS, Rafael Padilha dos; DAL RI, Luciene (orgs). **Direito constitucional comparado e neoconstitucionalismo**. Perugia: Università degli Studi di Perugia, 2016, p. 132-155.

[13] Regional Federal Court - 3, Interlocutory Appeal 502436, reporting judge Roberto Jeuken, judged on June 4, 2014. Similarly, The Supreme Federal Court) (Habeas Corpus no. 58727) considers that treaties on extradition overlap with ordinary legislation as they deal exclusively with judicial cooperation between two countries.

14 DOLINGER, Jacob. **Direito internacional privado: parte geral.** Rio de Janeiro: Forense, 2005, p. 107

As it will be analyzed, on the one hand, the Agreement has been mainly innovated by simplifying the requirements for obtaining a temporary residence permit concerning what was previously established by the Foreigner Statute and by the current Migration Law. In this sense, it was considered the creation of a "residence right" to Mercosur citizens. On the other hand, it has not brought new developments about foreigners' fundamental rights, only reinforcing the already existent constitutional and international guarantees.

1.1 The right to residence

Regarding the *ratione personae* scope of the application of the regulatory provisions of the Agreement on Residence, the Article 2 states that the beneficiaries are the Nationals of a Party, understood as “national” individuals who are nationals originating from one of the States Parties or the nationality acquired by naturalization for at least five years. In view of the right to family reunification, Article 9.2 of the Agreement allows members of the family of a Mercosur citizen, who are not nationals of one of the countries, to acquire the same residence permit as the national of a State Party, provided that there are no impediments to public order or security.

Under the Agreement on Residence terms, therefore, nationals of a State Party wishing to reside in the territory of another State Party may obtain legal residence in the latter State by proving their nationality and complying with the requirements of the Agreement. Concerning residence, the Agreements provide for two types of permission. The first is a “temporary residence” which, depending on the case, may last up to two years, and it may be converted into a “permanent residence”, provided that the applicant makes the request within ninety days before its expiration. If the individual does not request the conversion and remains in the receiving country, Article 6 requires that he/she is subjected to the State Party's internal migratory legislation in which he/she is located.

The requirements for the granting of temporary residence are listed in Article 4 of the Agreement[15] and for the conversion into permanent residence in Article 5[16]. From the analysis of the documentation requested, it is noted that only for the granting of permanent residence the immigration authorities may require proof of the petitioner's income.

It should be noted that for other foreign citizens, coming from third-party States, the new Migration Law requires the residence permit for a fixed period (temporary visa), proof of residence purpose, if the immigrant is not the beneficiary of a visa treaty.[17] In the case of a

[15] The applicant must present the following documentation: valid passport, identity card or certificate of nationality; birth certificate, proof of marital status and naturalization certificate when applicable; clearance certificate of judicial and/or criminal and/or police records of the last five years; self-declaration of absence of international criminal or police records; payment of a service fee and a medical certificate attesting the applicant’s psycho-physical capability if so required by the domestic law of the State Party.

[16] The interested party must present the following documents: temporary residence certificate; valid passport or identity card; clearance certificate of judicial and/or criminal and/or police records, in the receiving country; proof of the legitimate means of life that allow the petitioner and his/her relatives to subsist; payment of a fee.

[17] For the health visa, it is necessary to prove means of subsistence; in the case of vacation-work, the concession to the older than 16 years from a country that grants the same benefit to the Brazilian citizen.

temporary work visa, proof of job offer formalized by a legal entity acting in the country will be waived if the immigrant proves a degree in Higher Education or equivalent (article 14, paragraph 5). For the indefinite residence, the new Law also requires proof of the purpose of the residence or the situation of the person (according to article 30, points I and II), also recognizing the benefit from a treaty in matters of residence and free transit.[18]

The new Law allows, through articles 14, in point III, and 30, in point III, the possibility for the Executive Branch to extend the possibilities of granting the temporary visa and permanent residence.[19] The possibility of regulating the new hypotheses should be authorized by the National Immigration Council, an organ linked to the Executive Branch.[20]

In view of this new rules introduced by the Agreement and recognized by the new Migration Law[21], the contours of yet another differentiation of types of foreigners in the Brazilian legal system[22] are outlined, distinguishing them as a "*mercosulino*" (Mercosur individual) immigrant and a third State immigrant, since, from the bureaucratic point of view, the first receives differential treatment and has exclusive prerogatives as regards the attainment of the right of residence.

Ultimately, Mercosur is, in these terms, approaching the existing system in the European Union that differentiates treatment granted between citizens of one of the member States[23] and that offered to the non-community citizens. It is true that, in the process of European integration, the citizen enjoys a number of rights and prerogatives[24] which go far beyond facilitating the

[18] Law no. 13,445, May 24, 2017: see article 30, s.

[19] This possibility is reaffirmed in paragraph 10, vetoed by the President of the Republic, of article 14. As a reason for the veto, it is stated that it is not appropriate and advisable to allow the relevant temporary visa institute to have new possibilities, beyond those defined in the law, created by regulation, with a risk of undue discretion and with the potential to generate legal uncertainty. However, the veto does not limit the possibility of creating new hypotheses of temporary visa or permanent residence, considering the maintenance of point III of article 14 and point III of article 30. Message no. 163, dated May 24, 2017, from the President of the Republic to the President of the Federal Senate, on partial veto, based on contrariety for public interest and unconstitutionality of Bill no. 288 of 2013 (no. 2,516/15 in the Chamber of Deputies), which Institutes the Migration Law. Retrieved from: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/Msg/VEP-163.htm. Art. 31 points out that the deadlines and the procedure for the residence permit referred to in art. 30 will be arranged in regulation, observing the law's provisions.

[20] The National Immigration Council (known in Brazil as CNIg) is a Federal agency linked to the Ministry of Labor and Social Security and a coordinating body of the Brazilian Migration Policy. The Council is composed of representatives of the Federal Government, trade union centrals, employers' associations and civil society.

[21] Law no. 13,445, May 24, 2017: articles 14, point II; 30, point II, a, and article 111.

[22] It is important to recall that the Federal Constitution, in its article 12, provides differential treatment also to the Portuguese (paragraph 1), based on the status of equality, and those from other Portuguese-speaking countries (point II, letter "a") for purposes of access to Brazilian nationality.

[23] In-depth studies of the European Citizenship were carried out by: CASSESE, Sabino. La Cittadinanza europea e le prospettive di sviluppo dell'Europa. **Rivista Italiana di Diritto Pubblico Comunitario**, 5, 1996. MORVIDUCCI, Claudia. **I diritti dei cittadini europei**. Torino: Giappichelli, 2010. MOURA, Aline Beltrame de. **Cidadania da União Europeia:** potencialidade e limites dentro do marco jurídico europeu. Ijuí: Unijuí, 2013. CONDINANZI, Massimo; LANG, Alessandro; NASCIMBENE, Bruno. **Cittadinanza dell'Unione e libera circolazione delle persone.** Milano: Giuffrè, 2006. DOLLAT, Patrick. **La Citoyenneté Européenne:** théorie et statuts. Bruxelles: Bruylant, 2008.

[24] It is worth pointing out that certain rights of European citizens established in the second part of the Treaty on the Functioning of the European Union and Chapter 5 of the Charter of Fundamental Rights of the European Union: Right to freedom of movement and residence in the EU, without discrimination on grounds of nationality; Right to elect and to be elected in municipal and

granting of residence permits. However, with due regard for their proportions, it must be pointed out that this is an innovative situation compared to the national legislation prior to the date the Agreement on Residence took effect.

Following the comparative analysis with the European Union, it is curious to note that a European citizen who wishes to enjoy the right of residence in another Member State for more than three months, unlike the national of one of the Mercosur, must prove since the beginning of his/her stay the possibility of having enough financial resources for the maintenance of him/herself and his/her family.[25] Therefore, the Mercosur legislation is more favorable than the European regarding similar situations, demonstrating, in this respect, its character of vanguard in the protection of the immigrant.

In view of the facilitation of the granting of residence in one of the signatory States of the Agreement, some authors affirm that it introduced a real right of residence, that is, a *free residence area* in the territory of Mercosur.[26] In fact, article 8.1 is clear when affirming that people who have obtained the residence are entitled to enter, leave, move and reside freely in the territory of the country of reception, that is, free circulation is guaranteed only to the immigrant who circulates between the Country of origin and the Country of reception, but the right to reside is extended to any of the nine countries.[27]

Indeed, the simplification of the requirements for obtaining a temporary residence permit, concerning the documentation required by the Foreigner Statute and the Migration Law, is the significant contribution of the Agreement on Residence of Mercosur, since, as will be verified, the rights and guarantees provided to immigrants in the region do not seem to innovate in terms of substantial content and breadth compared to the rights already provided for by the 1988 Federal Constitution.

1.2 Civil rights

In its Article 9, the Agreement on Residence generally provides for equal civil rights between the nationals of the signatory States and the nationals of the receiving country.[28] Under

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European elections; Right to petition the European Parliament; Right to present a complaint to the Ombudsman; Right to consular protection for EU citizens without diplomatic representation; Right to request the Commission to propose new legislation.

[25] See article 7 of Directive 2004/38/CE.

26 AGUIRRE, Orlando; MERA, Gabriela; NEJAMKIS, Lucila. Políticas migratorias e integración regional: la libre circulación y los desafíos a la ciudadanía. In: NOVICK, Susana (Org.), **Migraciones y Mercosur: una relación inconclusa**. Buenos Aires: Catálogos, 2010, p. 65.

27 SALZMANN, Antonio Cardesa. El contenido jurídico de la libre circulación de personas en el Mercosur: balance y perspectivas. In: GOIZUETA VÉRTIZ, Juana; GÓMEZ FERNÁNDEZ, Itziar; PASCUAL GONZÁLEZ, María Isabel. **La libre círculación de personas en los sistemas de integración económica: modelos compara¬dos: Unión Europea, Mercosur y Comunidad Andina.** Navarra: Thomson Reuters Aranzadi, 2012. p. 166.

[28] See article. 9.1: Equality of Civil Rights: Nationals of the Parties and their families who have obtained residence under the Agreement shall be entitled to the same civil, social, cultural and economic rights and freedoms of nationals of the receiving country, in particular the right to work and exercise all lawful activity, under the conditions provided by law; petition the authorities; enter, stay, transit and leave the territory of the Parties; associate for lawful purposes and freely practice religion, according to the laws that regulate their exercise.

the Brazilian legal system, the extension of civil rights to foreigners arose mainly with the 1891 Constitution which, in article 72, provided: The Constitution guarantees to Brazilians and foreigners residing in the country the inviolability of freedom rights, individual security and property. The article, even though it covers the foreigner resident, excludes those in transit and holders of short-stay visas, such as tourists, executives, businessmen, artists and, in terms of legal entity, those who are not based in Brazil.

Very similar provisions to this are found in the Federal Constitutions of 1934 and 1946.[29] The concept of residence as an element of restriction of rights was removed, under the aegis of the Federal Constitution of 1946, by the Federal Supreme Court, in a writ of *mandamus* in 1957. The aforementioned action was aimed at protecting property of a foreign company not based in the country, equating rights of the juridical person with those of the human person. It was then understood that it would be a violation not to recognize the right of property of the foreigner in Brazil, regardless of his/her residence, and that it would not make sense to deny him/her legitimacy to the writ of *mandamus*.[30]

Since then it has been conceived that fundamental rights are firmly guaranteed within the limits of the territorial sovereignty of the Country, not limited to the national and foreigner resident.[31] This conception of extension of rights had and continues in the Federal Supreme Court,

[29] Constitution of The Republic of the United States of Brazil (of July 16, 1934). Art. 113 - The Constitution guarantees to Brazilians and foreigners residing in the country the inviolability of the rights concerning freedom, subsistence, individual security and property. Constitution of The Republic of the United States of Brazil (of July 16, 1934). Art. 113 - The Constitution guarantees to Brazilians and foreigners residing in the country the inviolability of the rights concerning freedom, subsistence, individual security and property. Constitution of The United States of Brazil (of September 18, 1946), Art. 141 - The Constitution guarantees to Brazilians and foreigners residing in country the inviolability of the rights concerning life, liberty, individual security and property. The Federal Constitution of 1946, even though it is one of the most democratic Brazilian constitutions, does not present the dignity of the human person as the foundation of the Republic and is much more concerned with the figure of the State than the Federal Constitution of 1988.

[30] In Extraordinary Appeal no. 33,919 (RTJ, 3/566, Reporting judge Minister Cândido Mota Filho), the Federal Supreme Court judged a writ of mandamus of a foreign firm, based in Lisbon, which was being determined by the tax authorities to auction cognac boxes of its own property. The point was to know whether the right of ownership and the right to use the writ of mandamus, provided for as fundamental rights, could be invoked by the firm, a non-resident person. The Federal Supreme Court understood that it would be a violation not to recognize the right of property of the foreigner in Brazil, regardless of his/her residence, and that it would not make sense to deny him/her legitimacy to the writ of mandamus, interpreting the clause of the article of the list of fundamental rights as denoting that individual rights are guaranteed in concrete within the limits of the territorial sovereignty of the Country. The Court concluded that when it is an act of Brazilian authority and the procedural remedy is intended to produce results within the country, it doesn't matter whether the foreigner resides. Thus, in the clause under examination, a simple indication of the spatial scope of validity of the fundamental rights proclaimed in the Brazilian Political Statute was noted. On a more recent occasion, the Superior Court of Justice explicitly reiterated the right of the non-resident foreigner to file a writ of mandamus (RMS 1,298-0, DJ of 29-8-1994). In Habeas Corpus 94.016, DJe of 27-2-2009, Reporting judge Minister Celso de Mello, the Supreme Court held the right of the defendant to observe, by the State, the pertinent guarantee to the due process of law, which, besides providing a concrete expression of the right of defense, it also finds legitimizing support in international conventions that proclaim the essentiality of this procedural franchise, which makes up the constitutional status of the right of defense, as a complex of principles and norms that protect any accused in the course of criminal prosecution, even if he/she is a foreign defendant, without domicile in Brazilian territory, prosecuted for alleged practice of crimes attributed to him/her. This lesson is the same that Minister Celso de Mello developed in Habeas Corpus 94.404, DJ of 26-8-2008" (Mendes & Branco, 2015, p. 173). It should be pointed out that Article 3 of the Civil Code of 1916 stated that the law does not distinguish between nationals and foreigners in regards to the acquisition and entitlement of civil rights.

[31] The heart of the debate was the possibility that the foreign company, a non-resident person, could be availed of the writ of mandamus for the protection of the fundamental right of property (Mendes & Branco, 2015, p. 173; Lopes, 2009, p. 459).

even under subsequent Brazilian Constitutions[32], being approved due to the similarity of the constitutional texts with respect to fundamental rights.[33]

In this way, the rights to petition the authorities; enter, stay, transit and leave the territory of the Parties; association for lawful purposes and freely practice one's religion, provided for in article 9, point I of the Agreement on Residence of Mercosur, are already assured by the Federal Constitution throughout article 5, and are extended to all regular foreigners, resident or not, not innovating in this aspect the Mercosur text.

It is noted that the 1980 Foreigner Statute allowed immigrants, in article 108, the association for cultural, religious, recreational, charitable or welfare purposes, to join social and sports clubs, and to any other entities with the same purposes, as well as participate in a commemorating meeting of national dates or events of patriotic significance. The right of political association is understood in this context as of lawful purposes. The restrictions on political activity, previously foreseen in the Foreigner Statute (article 107), which implied prohibition of arrangement and participation in organizations and manifestations of political ends, were not approved by the 1988 Federal Constitution due to the extension of individual rights to the foreigners.

The new Migration Law, in turn, recognizes the right of association for lawful purposes, guaranteed by article 5 of the Federal Constitution since 1988, as well as the humanitarian reception.[34]

1.2.1 Social rights

The Agreement on Residence also provides for social rights and, in the order of exposure, there is the right to work and equal treatment in labor rights. Subsequently, the affirmation of equal rights of social insurance and social security and education is observed. These rights can be found, mainly, in article 9, in points: 1. Equality of civil rights: Nationals of Parties and their families who have been granted residence under the Agreement shall be entitled to the same civil, social, cultural and economic rights and freedoms of nationals of the receiving country, in particular, the right to work and exercise all lawful activity, under the conditions provided by law; petition the authorities; enter, stay, transit and leave the territory of the Parties; associate themselves for

[32] See 1967 Federal Constitution (art. 150).

[33] The continuity of the concept of extension of rights is observed in the Federal Supreme Court judgments, as in Habeas Corpus 72.391, Reporting judge Minister Celso de Mello, j. 8-3-1995, P, DJ, 17-17-1995; Habeas Corpus 94.016, Reporting judge Minister Celso de Mello, j. 16-9-2008, 2nd T, DJE, 27-2-2009; Habeas Corpus 94.477, Reporting judge Minister Gilmar Mendes, j. 6-9-2011, 2nd T, DJE of 8-2-2012. Foreign subjects, even those without a domicile in Brazil, are entitled to all the basic prerogatives that ensure the preservation of libertarian status and the observance by the Government of the constitutional clause of the due process. The foreign subject, even if not domiciled in Brazil, has full legitimacy to apply the constitutional remedy of Habeas Corpus, in order to make effective, in the hypotheses of criminal prosecution, the subjective right, which also holds, to the observance and integral respect of the prerogatives that make up and give meaning to the due process clause. Non-Brazilian citizen legal status and the fact that the foreign defendant does not have a domicile in the country does not legitimize the adoption, against that accused, of any arbitrary or discriminatory treatment, that is, precedents.

[34] Humanitarian visas are provided for in the Resolutions of the National Immigration Council (CNIg) since 2012. On humanitarian visas, see normative Resolutions of CNIg: 97/2012, 102/2013 and 106/2013 (Haitian) and 17/2013 (Syrian).

lawful purposes and freely practice religion, according to the laws that regulate its exercise. 3. Equal treatment with nationals: Immigrants shall be entitled to, in the territory of the Parties, treatment no less favorable than that accorded to the nationals of the receiving country, as regards the application of labor legislation, especially as regards remuneration, work and social security. 4. Commitment on pension matters: The parties will examine the feasibility of entering into reciprocal agreements on social security matters. 6. Rights of immigrants' children: The children of immigrants who have been born in the territory of one of the Parties shall have the right to have a name, to register their birth and to have a nationality, in accordance with the domestic legislation. The children of immigrants shall be entitled to, in the territory of the Parties the fundamental right of access to education on an equal condition with nationals of the receiving country. Access to pre-school institutions or public schools may not be denied or limited to the circumstantial irregular situation of the parents' stay.

Considering them as rights of economic and social content, which aim to reduce social inequalities and improve living and working conditions for the population, they find correspondence in article 6 of the Brazilian Constitution of 1988, when establishes the right to education, health, alimentation, work, housing, leisure, security, social security, protection of motherhood and childhood , and assistance to the destitute.

The provision in the Agreement on Residence of equal treatment in social security is presented as part of the labor legislation and has no specific definition, leaving to the national parameters its definition and application. In the Brazilian legal system, social security has specific consequences, as it encompasses an integrated set of initiatives of the Public Authorities and of the society, aimed at ensuring the rights related to health, welfare and social assistance.[35] The unfolding of social security and its insertion linked to labor legislation allows the analysis of such rights of Mercosur foreigners in Brazil to be carried out jointly, according to the items below.

1.2.1.1 Labor rights

In the text of the Agreement on Residence, the social and economic rights provided are in particular the right to work and to exercise all lawful activity. Equal treatment, in accordance with articles 8.2 and 9.3, is also extended to all matters concerning the application of labor legislation. The Agreement is broad in scope, since it is a principle which includes the right to exercise any activity, whether autonomous or subordinate, under the same conditions as citizens of the receiving country, including the application of labor legislation, in particular remuneration, conditions of work and social security.

The right to work and to exercise lawful activity is regulated by law[36], according to the characteristics of each type of visa, and it is clarified that for the foreigner, in general and even without the right to work, equal conditions should apply. With regard to labor rights, the Brazilian

[35] See art. 1 of Law no. 8,742/1993 and art. 194 1988 Federal Constitution.

[36] See Law no. 6,815/80 and Law no. 13,445/2017.

Constitution does not limit such rights to their nationals, as it is observed from the Articles 6 to 11 of the 1988 Federal Constitution. The Brazilian labor laws follow this understanding, not distinguishing between domestic and foreign citizens, regulars or not.[37]

The Constitution is in line with the provisions of the Universal Declaration of Human Rights (1948), Conventions no. 97 (1949) and no. 143 (1975) of the International Labor Organization[38], of the Inter-American Convention on Human Rights (1969), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990)[39] and Advisory Opinion no. 18/2003 of the Inter-American Court of Human Rights[40].

In the specific scope of Mercosur, the 1998 Social and Labor Declaration, revised in 2015[41], also known as the Social Letter of MERCOSUR, ensures the protection of the worker in the bloc, despite being endowed with a mere exhortative and non-binding value.

[42]As already pointed out, the foreigner of any origin, whether or not part of Mercosur, has equal treatment with the national worker, having the right to receive salary and social benefits arising from an employment relationship.[43] The irregularity of the foreigner with the Brazilian State does not therefore compromise his/her labor rights, avoiding the encouragement of the employment of workers that would not imply labor obligations and would allow the illicit enrichment of the employer.[44]

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[37] The constitutional essence of the extension of rights is observed by not limiting labor rights and social security rights abroad and by affirming that Health is a right of all (article 196) or that Social assistance will be provided to those who need it (article 203). It should be noted that the Foreigner Statute maintained equality of labor rights to the foreigners, according to art. 95, but limited rights, for example, with respect to the domicile of the worker in some cases of permanent visa.

[38] Adopted by the General Conference of the International Labor Organization at its 32nd session in Geneva on July 1, 1949. Entry into effect in the international order: January 22, 1952, incorporated into the Brazilian legal system by Decree no. 58,819, of July 14, 1966. Convention 143 of the ILO, adopted in 1975, and not ratified by Brazil (http://www.oitbrasil.org.br/content/convention_no).

[39]Adopted by General Assembly Resolution 45/158, December 18, 1990 (with effect on July 1, 2003), the aforementioned Convention has not yet been incorporated into the Brazilian legal system.

[40] Advisory Opinion OC-18/03 of September 17, 2003, requested by the United Mexican States on the legal status and rights of undocumented migrants.

[41] The document, signed on December 10, 1998, in Rio de Janeiro established programmatic principles of regional integration, being divided into four main parts. The first two refer to the private content of labor relations, that is, to individual and collective rights. The latter, in turn, concern public aspects, such as those linked to state obligations, which have been called “other rights” and “application and follow-up” rules regarding the validity of the instrument. The Declaration was updated on July 17, 2015, in Brasilia, and among the main advances, the new Declaration establishes the possibility of reaching collective agreements in the bloc and consolidating the recognition of the right to strike.

[42] SALZMANN, Antonio Cardesa. El contenido jurídico de la libre circulación de personas en el Mercosur: balance y perspectivas. In: GOIZUETA VÉRTIZ, Juana; GÓMEZ FERNÁNDEZ, Itziar; PASCUAL GONZÁLEZ, María Isabel. **La libre círculación de personas en los sistemas de integración económica: modelos compara¬dos: Unión Europea, Mercosur y Comunidad Andina.** Navarra: Thomson Reuters Aranzadi, 2012, p. 171.

[43] Law no. 6,815/80 (art. 95), and Law no. 13,445/2017 (art. 4. VIII).

[44] The Judiciary has recognized the labor rights of irregular foreigners, based on the Federal Constitution and the Inter-American Declaration of Human Rights, of which Brazil is a signatory, which establishes equality before the law and excludes the possibility of discriminatory treatment of foreign workers who are in the country in a situation of migratory irregularity. The interpretation of the American Declaration of Human Rights on the subject is provided for in Advisory Opinion no. 18/2003 of the Inter-American Court of Human Rights, which states that regardless of their status, whether documented or not, migrant workers must be entitled to full and effective labor rights as granted to nationals of the country in which they are located. In this sense, the National Council of Justice, in partnership with the Human Rights Secretariat (HRS), awarded in 2017, in the First National Contest of Judicial Decisions and Judgments in Human Rights, the decision of Judge of the 2nd Labor Court of Francisco Beltrão -

The Inter-American Court of Human Rights, through Consultative Opinion no. 18/2003, which deals specifically with the rights of undocumented foreigners, affirms the equality of labor rights between regular and irregular nationals and foreign citizens: 134. In this way, the migratory quality of a person cannot in any way constitute a justification for depriving him/her of the entitlement and exercise of his/her human rights, including those of a labor nature. The migrant, when entering into a labor relationship, acquires rights for being a worker, which must be recognized and guaranteed, regardless of their regular or irregular status in the State of employment. These rights are a consequence of the labor relationship. 136. However, if undocumented immigrants are hired to work, they immediately become holders of the labor rights that correspond to the workers, without there being any possibility of discrimination because of their irregular situation. This is of utmost importance, since one of the main problems in the field of immigration is that migrants who lack work permits are hired under unfavorable conditions compared to other workers.[45]

In this sense, in 2006, the Sixth Panel of the Superior Labor Court (known in Brazil as TST) recognized, in the case of RR 750094/2001, the right of a Paraguayan worker, in an irregular situation in Brazil, to call upon the Labor Court, in the search for labor rights.[46] The decision is based on constitutional principles and the Protocol of Cooperation of Mercosur.[47]

The Superior Labor Court decision was not limited, however, to the situation of an irregular worker of a Mercosur national in Brazil and extends it to all the work of irregular foreigners in Brazil.[48] The Labor Court has been very sensitive to the rights of irregular foreigners, extending its

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Paraná, Brazil, for the release of the guarantee fund for time of service (known in Brazil as FGTS) to an immigrant worker from Bangladesh who was in Brazil illegally.

[45] Advisory Opinion 18/2003 of the Inter-American Court of Human Rights, p. 110. Retrieved on June 27, 2020 from http://www.cnj.jus.br/files/conteudo/arquivo/2016/04/58a49408579728bd7f7a6bf3f1f80051.pdf

[46] The foreigner in question would have worked for 17 years in national territory and would have been dismissed without receiving the rescission sums and the FGTS (guarantee fund for time of service).

[47] Article 3 of the Protocol stipulates that citizens and permanent residents of one of the States Parties shall be entitled to, under the same conditions as nationals and permanent residents of the other State Party, free access to the jurisdiction of that State for the defense of their rights and interests. The Superior Labor Court reformed the judgment of the Regional Labor Court of the 24th Region (Mato Grosso do Sul), which declared null and void the employment relationship of more than 17 years of the Paraguayan electrician and Comercial Eletromotores Radar Ltd., in the case of the foreign worker's violation of art. 21, paragraph 1, of Law no. 6,815/80 and art. 359 of the Consolidation of Labor Laws (known in Brazil as CLT), of absence of a foreigner's identity card. By affirming the nullity of the employment relationship, the Regional Labor Court prevented the examination of the right of the foreigner to the labor sums not received during the more than 17 years of employment relationship. The Superior Labor Court reformed the decision under review of the employee's appeal. The Reporting judge, Horacio Pires, emphasized the prevalence of the principles of human dignity, social values of work and free enterprise, promotion of well-being, without prejudice of origin, race, sex, color and age and the principle of isonomy granted to Brazilians and foreigners residing in Brazil. Considering this, and considering that it would be absolutely inconceivable that a contract of employment involving a Brazilian worker could be declared void by virtue of the mere inexistence of an identity document, it is unequivocal the conclusion that it is the worker's right". The decision of the Superior Labor Court dismissed the alleged nullity and the files were sent to the first instance for the examination of the right to the sums pleaded in the action. See Electronic Journal, Year II, Number 33, 1st half of October 2006 on www.trt4.jus.br/RevistaEletronicaPortlet/servlet/download/33edicao.doc. See the news site of the Superior Labor Court at http://www.tst.jus.br/noticias/-/asset_publisher/89Dk/content/id/2254060

[48] The Superior Labor Court understands that foreigners coming from Mercosur States Parties should be entitled to the same conditions as Brazilian nationals, with free access to the jurisdiction for the defense of their rights and interests, since the Las Leñas Protocol of 1992, incorporated into law by Decree no. 2.067/96.

action to labor contracts carried out in another country and in which there has been provision of services in the Brazilian territory. [49]

1.2.1.2 Welfare

The Agreement on Residence, in article 9.3, affirms the equality of treatment between nationals and immigrants of Mercosur with regard also to "welfare". In Brazil, welfare implies the right to health, social security and social assistance, according to article 194, item I, of the Federal Constitution of 1988. The article establishes "universality" as an objective of welfare, making it a right of all people resident in the country, including foreigners.[50]

In Brazil, the right to health is independent of international treaties and corresponds to the care implemented by the Unified Health System (known in Brazil as SUS), which provides universality and care for nationals and foreigners (regular and irregular).[51] The right to health is a fundamental human right and implies universality of access and equality of health care, without any preconceptions or privileges of any kind.[52] In this sense, it is observed the duty of care of the Unified Health System to everyone in national territory, even to irregular foreigners.[53]

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[49] The Third Panel of the Superior Labor Court decided that the Brazilian Labor Justice is competent to judge the actions of an Argentinian engineer who had worked for years concurrently in Brazil and Argentina. Dismissed after 23 years of work in the economic group Macri (a telecommunications engineering company with branches in Brazil), the engineer asked for recognition of the employment relationship and the resulting rights. But the requests were denied in the first and second instances. According to Minister Alberto Bresciani, reporting judge of the process, as there was service in the Brazilian territory there was no reason to deny national jurisdiction. Retrieved from http://www.tst.jus.br/noticias/-/asset_publisher/89Dk/content/id/2254060

[50] Art. 194 of the 1988 Federal Constitution affirms that social security comprises an integrated set of initiatives by public authorities and society aimed at ensuring the rights to health, welfare and social assistance. Single paragraph: It is the responsibility of the public power, according to the law, to organize social security, based on the following objectives: I - universality of coverage and service.

[51] Art. 196 of the 1988 Federal Constitution points out that Health is the right of everyone and the duty of the State, guaranteed through social and economic policies aimed at reducing the risk of disease and other injuries and universal and equal access to actions and services for their promotion, protection and recovery.

[52] Law no. 8,080, of September 19, 1990, art. 2 affirms that Health is a fundamental right of the human being, and the State must provide the conditions necessary for its full exercise; and article 7 ensures that the actions and public health services and the contracted private services that integrate the Brazilian Publicly funded health care system (known as SUS - Sistema Único de Saúde - Unified Health System) are developed in accordance with the guidelines set in article 1988 of the Federal Constitution, obeying the following principles: I - universality of access to health services at all levels of care; II - integral care, understood as an articulated and continuous set of preventive and curative actions and services, individual and collective, required for each case at all levels of complexity of the system; III - preservation of the autonomy of the people in the defense of their physical and moral integrity; IV - equality of health care, without any preconceptions or privileges of any kind; V - the right to information, to the assisted ones, on their health; VI - dissemination of information on the potential of health services and their use by the user; VII - use of epidemiology to prioritize, allocate resources and programmatic orientation; VIII - community participation; IX - political-administrative decentralization, with a single direction in each sphere of government: a) emphasis on the decentralization of services to municipalities; b) regionalization and hierarchization of the health services network; X - executive level integration of health, environment and basic sanitation actions; XI - a combination of the financial, technological, material and human resources of the Union, the States, the Federal District and the Municipalities in the provision of health care services to the population; XII - ability to resolve services at all levels of assistance; and XIII - organization of public services in order to avoid duplicity of means for the same purpose. XIV - organization of specific and specialized public services for women and victims of domestic violence in general, guaranteeing, among other things, psychological care and restorative plastic surgeries, in accordance with Law No. 12,845, of August 1, 2013. (Drafting provided by Law 13,427, of 2017).

[53] Brazilian Publicly funded health care system (known as SUS - Sistema Único de Saúde): Bone marrow transplant. Free treatment for foreigners - article 5 of The Federal Constitution. The art. 5 of the Federal Constitution, when guarantees the fundamental rights to Brazilians and foreigners residing in the country, is not demanding the domicile of the foreigner. The meaning of the constitutional provision, which establishes equality of treatment between Brazilians and foreigners, requires that the foreigner should be under the Brazilian legal-constitutional order, no matter in what condition. Even the foreigner in an irregular situation

Specifically, Article 9.4 of the Agreement on Mercosur Residency refers to social security obligations, declaring that States Parties shall examine the possibility of signing reciprocal agreements in this regard. The absence of substantial content of this provision could be overcome by simply referring to the 1997 Mercosur Multilateral Agreement on Social Security.[54]

The Agreement recognizes the basic substantive principles of international right on social security, such as the law enforcement from the execution site, non-discrimination, retention of acquired rights and accumulation of working time. There is no doubt that the opportunity to insert the norms into the new Agreement or simply to mention it has been lost, showing this way the coherence and the dialogue of the norms emanating from Mercosur. In addition, there is a similar lack of careful reading of other provisions of the Agreement.

In Brazil, social security does not present a constitutional limitation to nationality and attends the contributory character and compulsory affiliation.[55] Despite this non-limitation, there are international agreements between Brazil and several countries, with the objective of guaranteeing the welfare rights, and in particular of social security rights to all legal workers and dependents. The treaty, though, does not bring an innovative treatment to the foreigners.[56]

The incomplete affirmation of equal social security rights, in the Agreement on Residence, as mentioned above, refers to the content of the law at the national level, also unfolding in the right to social assistance. Social assistance is provided for in Article 203 of the Federal Constitution and implies in state provision, of a universal and non-contributory nature, and should be delivered to those who need it, in order to supply social minimums and guarantee the fulfillment of basic needs.

The constitutional objectives of social assistance are: protection to the family, motherhood, childhood, adolescence and old age; protection of needy children and adolescents; promote integration into the labor market; empowerment and rehabilitation of people with disabilities and the promotion of their integration into community life; guarantee of a minimum salary as a monthly benefit to the person with disability and to the elderly who prove that they do not have the means to provide for their own maintenance or to have it delivered by their family, as provided by law.[57]

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in the country is protected by fundamental rights and guarantees. (4th Region of the Regional Federal Court, AG 2005040132106/PR, j. 8/29/2006).

[54] Decree CMC no. 19/97 of December 15, 1997, took effect internationally on June 1, 2005 and was incorporated in Brazil through Executive Decree no. 5,722, effective in the national territory on March 13, 2006. For further information see: Uriarte, E. O. (2004). La Dimensión Social del Mercosur. Montevideo: Fundación de Cultura Universitaria. With regard to the obligation of the States Parties to guarantee the application of the principle of non-discrimination in this matter see the Argentinian jurisprudence: Corte Suprema de Justicia de La Nación. Recurso de hecho: A. 1023. XLIII, caso Alvarez, Maximiliano y otros c/ Cencosud S.A., of December 7, 2010.

[55] Article 201 of the Brazilian Federal Constitution.

[56] Retrieved on June 28, 2020 from http://www.previdencia.gov.br/a-previdencia/assuntos-internacionais/assuntos-internacionais-acordos-internacionais-portugues/.

[57] Article 203 of the Brazilian Federal Constitution.

Social assistance in Brazil is governed by specific law, the Organic Law of Social Assistance[58] (known as LOAS), which in its first article opposes the 1988 Federal Constitution by limiting to Brazilian citizens a universal and constitutionally guaranteed right, vetoing it to the foreigner. The debate on the applicability to foreigners of the right to social assistance came to an end in 2009, when due to its universal constitutional character, the Federal Supreme Court confirmed, through the Extraordinary Appeal no. 587970[59], a decision of the Federal Justice that article 203-A of the 1988 Federal Constitution provides social assistance "to those in need of it", regardless of nationality.[60]

As a result of such decision, the applicability of restriction of social assistance as a right of the national citizen only is removed, by extending the possibility of granting continued benefit in the amount of a monthly minimum salary to the elderly foreigners and those with disabilities who prove that they do not have the means to provide for their own maintenance or have it provided by their family.[61]

The extension of the right to social assistance to foreigners is not unrestricted, but is limited to those regularized. The veto to the right of social assistance to irregular foreigners is an exception in view of the extension of labor rights (already seen above) and educational legislation, as it will be explained in the next item.

1.2.1.3 Right to education of the children of immigrants

The Agreement on Residence also grants rights to the children of migrants, guaranteeing them the right to name, birth registration and acquisition of nationality, in accordance with the domestic legislation, as well as the fundamental right of access to education in conditions of equality with the citizens of the receiving country, regardless of whether or not the migrant parents' situation is regular.[62]

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[58] See Law no. 8,742, of December 7, 1993, art. 1, which says that the social assistance, citizen's right and duty of the State, is Non-Contributory Social Security Policy, which provides social minimums, carried out through an integrated set of actions of public initiative and society, to ensure the fulfillment of basic needs.

[59] Supreme Federal Court, Extraordinary Appeal 587970 RG/SP, reporting judge Minister Marco Aurélio de Mello, judged on June 25, 2009.

[60] The extraordinary appeal had general repercussions recognized and the understanding of the Federal Supreme Court must be applied throughout the Judiciary to similar proceedings. The thesis states that foreigners residing in the country are beneficiaries of the social assistance provided for in article 203, item V, of the Federal Constitution, once the constitutional and legal requirements have been met. The case in question originated in 2005, when the National Institute of Social Security (known in Brazil as INSS - Instituto Nacional do Seguro Social) appealed against the decision of the first and second instance of Federal Justice which granted the benefit of the Organic Law of Social Assistance, alleging, this time, violation of the Federal Constitution. According to the local authority, article 203-A, item V, conditions the granting of the benefit to the regulatory law (Federal Law 8,742/1993) that limits this right to Brazilian citizens. The INSS's understanding also conforms to Decree 6,214/2007, which regulated Law 8,742/1993. About this subject, see http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=341292&caixaBusca=N . Similarly, in 2010, Process no. 0507062-90.2009.4.05.8100, judged by the Appeal Panel of Ceará State.

[61] Law no. 8,742, of December 7, 1993, art. 2, point I, e) guarantees one minimum salary as a monthly benefit to the person with disability and the elderly who prove that they do not have the means to provide for their own maintenance or have it provided by their family.

[62] Decree 6,975, of October 7, 2009, article 9, related to the rights of immigrant children affirms that the children of immigrants who have been born in the territory of one of the Parties shall have the right to have a name, to register their birth and to have a nationality, in accordance with their respective domestic legislation. The children of immigrants shall be entitled to, in the

The rights reserved to the children of migrants, by the Agreement on Residence, are no less than the application of human rights principles established by international conventions[63] and by the Federal Constitution.

Besides the right to education, the Federal Constitution also provides for the guarantee of naturalization to the children of immigrants born in Brazil.[64] The children of foreigners who have been born in another country, the rights provided for to the foreigner in general and that applies to individual rights and social rights, such as education, health and social assistance, are guaranteed.

The Federal Constitution, in article 227, does not determine conditions of nationality or regularity to the duty of the family, society and the State to the child and the adolescent regarding the right to life, health, food, education, leisure, professionalization, culture, dignity, respect, freedom and family and community coexistence, besides safeguarding them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression.

Even if the Foreigner Statute conditioned the exercise of the right to education to the foreigner's registration to the Ministry of Justice[65], the Federal Constitution, in article 205, ensures education as the right of everyone and as a duty of the State, being Basic Education compulsory and free to those between 4 and 17 years of age. In the same sense, it is possible to observe the Statute of the Child and the Adolescent of 1990, in article 53[66], allowing schools not to notify the authority responsible for immigration about the documentary situation of students and parents.

2. THE NEW MIGRATION LAW

The new Migration Law, no. 13.445/2017, was promulgated on May 24, 2017 and took effect 180 days after its promulgation, that is, on November 21, 2107. It follows constitutional and international principles regarding respect for human rights.

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territory of the Parties the fundamental right of access to education on an equal basis with nationals of the receiving country. Access to pre-school institutions or public schools may not be denied or limited to the circumstantial irregular status of the parents' stay.

[63] Reference is made, for example, to the Universal Declaration of Human Rights of 1948 and to the International Convention on the Rights of the Child of 1989, both adopted by the General Assembly of the United Nations.

[64] Article 12, point I, a, of the Brazilian Federal Constitution.

[65] Law no. 6,815/1980, article 48 affirms that except as provided in paragraph 1 of article 21, the admission of a foreigner to a public or private entity, or enrollment in an educational institution of any degree, shall only take effect if it is duly registered (article 30).

[66] Article 205 of the Federal Constitution affirms that education, the right of all and the duty of the State and the family, will be promoted and encouraged with the collaboration of society, aiming at the full development of the person, his/her preparation for the exercise of citizenship and his/her qualification for work, and article 208 says that the State's duty towards education shall be fulfilled by guaranteeing: I - compulsory Basic Education free of charge to students from 4 to 17 years of age, including its free offer for all those who did not have access in the appropriate age (Drafting provided by Constitutional Amendment No. 59, of 2009). Law 8,069/1990 provides, in article 53, that children and adolescents have the right to education, aiming at their full development, preparation for the exercise of citizenship and qualification for work.

The new legislation is broader and more comprehensive in terms of individual and social rights than the Agreement on Residence and allows cumulative rights. It should be noted, however, that some rights affirmed in the law, although omitted or vetoed by the Foreigner Statute, were already recognized in the constitutional scope. The rights of the new law are guaranteed to all foreigners, regardless of the migratory situation, and do not exclude others arising from a treaty of which Brazil is a party.[67] Article 4 of the Federal Constitution indicate: The migrant shall be guaranteed in the national territory, on an equal basis with nationals, the inviolability of the right to life, liberty, equality, security and property, and shall be ensured: I - civil, social, cultural and economic rights and freedom; II - right to freedom of circulation in national territory; III - right to the migrant's family reunion with his/her spouse or partner and their children, relatives and dependents; IV - measures to protect victims and witnesses of crimes and violations of rights; V - right to transfer resources deriving from their income and personal savings to another country, observing the applicable legislation; VI - right of assembly for peaceful purposes; VII - right of association, including trade union, for lawful purposes; VIII - access to public health and social welfare services and social security, in accordance with the law, without discrimination on grounds of nationality and immigration status; IX - wide access to justice and free legal assistance free of charge to those who prove insufficient resources; X - right to public education, prohibition of discrimination based on nationality and migratory status; XI - guarantee of compliance with legal and contractual labor obligations and application of labor protection standards, without discrimination on grounds of nationality and immigration status; XII - exemption from the fees referred to in this Law, by means of a declaration of economic hyposufficiency, in the form of a regulation; XIII - right of access to information and guarantee of confidentiality with regard to the personal data of the migrant, in the terms of Law no. 12,527, of November 18, 2011; XIV - right to open a bank account; XV - right to leave, to stay and to re-enter national territory, even while pending application for a residence permit, extension of stay or transformation of a visa into a residence permit; and XVI - right of the immigrant to be informed about the guarantees granted to him/her for the purpose of regularization of immigration. At this point, The Federal Constitution also affirms, in its paragraph 1: The rights and guarantees provided for in this Law shall be exercised in compliance with the provisions of the Federal Constitution, regardless of the migratory situation, subject to the provisions of paragraph 4 of this article, and do not exclude others arising from a treaty to which Brazil is a party.

The Law innovates by providing for the repudiation of the practices of summary deportations, non-criminalization of immigration, non-discrimination by virtue of the means of entry into national territory and prohibition of arbitration at the entrance.[68] The new Migration

[67] Law 13,455 Article 4, paragraph 1 states that the rights and guarantees provided for in this Law shall be exercised in compliance with the provisions of the Federal Constitution, regardless of the migratory situation, subject to the provisions of paragraph 4 of this article, and do not exclude others arising from a treaty of which Brazil is a party.

[68] Law 13,455, article 45, single paragraph, affirms that no one shall be prevented from entering the country on the grounds of race, religion, nationality, membership of a social group or political opinion. It is evident that the practice of collective expulsion was already prohibited by the American Convention on Human Rights (article 22.9).

Law, in accordance with the Federal Constitution (1988), provides for the application of international treaties, such as residence and free circulation (articles 3, point XI; 4, paragraph 1; 14, point II; 23; 30, point II, a), expressly mentioning the agreements reached within Mercosur (art. 111).

Important opening points to the foreigner, of the new Law, were vetoed by the President of the Republic, as in the right to free circulation of indigenous peoples in lands traditionally occupied (article 1, paragraph 2), to the exercise of a position, employment or public job, to documentary evidence that is unreasonable or impossible and hinders or impedes the exercise of his/her rights (article 4), free circulation (article 44), amnesty and regularization of immigration (article 116). The presidential veto also includes provisions that would facilitate the naturalization of the foreigner "natural of a State Party or State associated with the Common Market of the South (Mercosur)", and reduce the length of residence for at least one year (article 66, point IV).

About the documentation required for the regularization of the foreigners' migration, it can be seen that, as analyzed in precedence[69], the new Law still brings more restrictions compared to the procedure provided for in the Mercosur Residence Agreement. Thus, it can be said that the immigrant coming from one of the signatory States of the Agreement will have a simpler administrative process compared to a foreigner from any other country.

Concerning the substantive content of guaranteeing fundamental rights for immigrants, the new Law spells out a whole range of rights that are very much guaranteed in the Constitution. In this sense, the affirmation and extension of the rights to foreigners present in the Agreement on Residence and in the new Law of Migration, denote a strong step in the way of the consolidation of rights that are based on the dignity of the human person and that are widely provided for in the Federal Constitution.

CONCLUSIONS

In view of the prerogatives accorded to nationals of the Mercosur Member States who reside in another State signatory to the Agreement, analyzed in precedence, it is possible to verify that almost all the rights are already recognized and guaranteed to all individuals, regardless of their nationality,[70] by the Brazilian Federal Constitution of 1988. The legal basis for such a conception lies in the principle of the dignity of the human person: The declaration of fundamental rights of the Constitution covers several rights that are rooted directly in the principle of the human dignity - principle that the art. 1, point III, of the Federal Constitution considers structural for the Brazilian democratic State. The merely circumstantial factor of

[69] See 1.1 above.

[70] See Habeas Corpus no. 94,477, judged on September 6, 2011. The Federal Constitution of 1988 also establishes limits to the rights of foreigners (as well as the presence of foreign capital) through article 5, points LI and LXXIII; article 12, paragraph 3 and 4, point I; article 89, point VII, articles 170, 172, 176, paragraph 1; articles 190, 192, 199, paragraph 3; article 222, paragraph 1, 2 and 3, and limitation of political rights through article 14, paragraph 2 and even with naturalization , restrictions on political rights persist through paragraph 3 of article 12.

nationality does not except the respect due to the dignity of every man. There are guaranteed rights, regardless of the nationality of the individual, because they are considered necessary emanations of the principle of the dignity of the human person. Some rights, however, are directed to the individual as a citizen, taking into account the particular situation that binds him/her to the country. Thus, political rights presuppose exactly the Brazilian nationality. Social rights, such as the right to work, also tend to be understood as non-inclusive of foreigners without residence in the country. Within the scope of the so-called individual rights, the rights of the non-resident foreigners gain more significance.[71]

The constitutional preamble does not mention the limitation of individual and social rights to the national citizen and emphasizes as supreme values a fraternal society, pluralistic and without prejudice, based on social harmony.[72] The constitutional essence, well observed in the preamble, extends through the Constitution's articles, and it is possible to observe the equality and non-discrimination presuppositions to the foreigner, for the individual and social rights, posteriorly foreseen in the Agreement on Mercosur Residence.

The fundamental objectives of the Republic, mentioned in article 3, of building a free, fair and supportive society; eradicate poverty and marginalization and reduce social and regional inequalities; and promote the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination[73], also reinforce the extension of rights to foreigners and veto any form of discrimination. In this sense, it is also observed in art. 4, point II, the provision for the prevalence of human rights, with regard to international relations and article 5 of the Federal Constitution when guaranteeing equality of treatment between Brazilians and foreign residents.[74]

The constitutional opening to the foreigners is reinforced, as already mentioned, by the Universal Declaration of Human Rights, the Conventions of the International Labor Organization, the Advisory Opinions of the Inter-American Court of Human Rights and the 1998 Mercosur Social and Labor Declaration, revised in 2015.

In this context, the foreigner's legal status in Brazil, after ratification of the Agreement on Residence of the States Parties of Mercosur, seems to delineate the contours of a model that differentiates foreigner typologies, as in the European system. The Federal Constitution (1988)

[71] Mendes & Branco (2015, p. 173), point out that there are rights which are considered necessary emanations of the principle of the human dignity, and, for this reason, it is recognized to the foreigner the right to the basic guarantees of the human person: life, physical integrity, right of petition, right to effective judicial protection, among others.

[72] The Preamble of the 1988 Federal Constitution affirms that the representatives of the Brazilian people, gathered in a National Constituent Assembly to establish a Democratic State, designed to ensure the exercise of social and individual rights, freedom, security, well-being, development, equality and justice as supreme values of a fraternal, pluralistic and unprejudiced society founded on social harmony and committed, in the domestic and international order, with the peaceful solution of controversies, we enact, under the protection of God, the Constitution of the Federative Republic of Brazil.

[73] The principle of equality must guide the treatment of foreigners, considering the exceptions provided for in the Federal Constitution, such as restricted access to public office, prohibition of military enlistment and voting.

[74] According to Lopes (2009, p. 469), human rights are prevalent in the event of a collision with national sovereignty rules and immigration laws, not only because they refer to international treaties but also according to constitutional provisions, with limitations to the very provisions of the Constitution.

itself provided for a differential treatment of Portuguese and Portuguese-speaking people regarding the entitlement of rights and access to Brazilian nationality. With the Mercosur Agreement on Residence, the definition of a migratory model that distinguishes the treatment accorded to the foreigner depending on his or her country of origin became even more evident.

With regard to the Agreement, it is noted that the only apparent privilege of foreigners coming from one of Mercosur's States Parties is the simplification of the procedure for granting a temporary residence permit. However, it should be noted that at no time in the former 1980 Foreigner Statute was there any reference to human dignity, and in the Agreement on Residence, the only reference is made in the preamble, which mentions the fight against human trafficking.

In the analysis of the Agreement, it can be noted that, for the most part, the Mercosur rules only reinforce the already existing legal framework of rights pertaining to foreigners in Brazil, which are framed in a broader perspective of human rights protection, whose corollary is the principle of the dignity of the human person. Thus, even though the agreement is neither a novelty nor a privilege for beneficiary subjects, the Agreement confirms the importance of protecting individuals as human beings and not only as economically active individuals, protecting, in particular, the interests of minors and the family of the immigrant.

It should be noted, however, that at no time in the former 1980 Foreigner Statute was there any reference to human dignity and in the Agreement on Residence the only reference is made in the preamble, which mentions the fight against human trafficking. In turn, the new Migration Law of 2017 refers to dignity in a single passage, through the expression "dignified life", and in a context of public policies for Brazilian migrants and not for foreigners on Brazilian soil.[75]

Finally, it was verified that the Mercosur Residence Agreement has the role of stimulating the possibility of reciprocity agreements involving the Member States and Associated States of this process of regional integration by making advances, especially in relation to residence fixation in the context of the bloc, simplifying the demands previously required in the Foreigner Statute and in the new Migration Law, in relation to the other foreigners. However, the Mercosur Agreement loses the opportunity to present itself as a vanguard instrument, not innovating the legal order of the country in regard to the guarantee and fulfillment of fundamental rights.

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[75] Law no. 13,445, of 2017, article 77, affirms that Public policies for emigrants shall observe the following principles and guidelines: II - promotion of decent living conditions, through, among others, facilitation of consular registration and provision of consular services in the areas of education, health, work, social security and culture.

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JUDICIAL INTEGRITY AT THE TRANSNATIONAL REALM: THE LEGITIMACY OF THE UNITED NATIONS PRINCIPLES OF JUDICIAL CONDUCT IN TIMES OF IDEOLOGICAL CONFLICTS OVER GLOBALIZATION, GLOBALISM, ANTI-GLOBALIZATION, AND NATIONALISM

Gilson Jacobsen[1]
Caroline Bündchen Felisbino Teixeira[2]
Miguel Angelo Zanini Ortale[3]

INTRODUCTION

Globalism, or political globalization, has its concept associated with authoritarianism with claims to centralize decision-making at the world level and standardize national laws. The United Nations, from a more radical nationalist perspective, is now viewed as one of the villains of globalism. It turns out that globalization itself, which is an economic rather than a political concept, is a reality to which nations cannot escape without losing resources and wealth and, consequently, damaging their economies, because it is not economically viable for a country to close its market and produce everything it consumes[4].

In view of this, one cannot turn a blind eye to the needs expressed by global economic players at the time of choosing the countries in which to invest their resources. To be attractive to contracts, trade partnerships, and international investments, a nation needs to convey reliability. Thus, even without a pretense of pasteurization of domestic laws, some ethical pillars need to be evident so that the institutions of a country can transmit reliability to be perceived internationally. No wonder "Risco Brasil" is so high: Brazilian Judiciary Branch, among other institutions, is not currently seen abroad as reliable. For these reasons, the idea that there is no need to follow international ethical standards sounds naive.

[1] Professor at Master's and Doctoral Program in Legal Science at the University of Vale do Itajaí – UNIVALI (Brazil). Post-doctorate in Law and Constitutional Justice from the Alma Mater Studiorum Università di Bologna – UNIBO (Italy). Doctor in Public Law from the Università degli Studi di Perugia – UNIPG (Italy). PhD and Master in Legal Science from the University of Vale do Itajaí - UNIVALI. Visiting Professor at the Widener University - Delaware Law School (USA). Trainer of Trainers at the National School for the Training and Improvement of Magistrates – ENFAM, Brasília (Brazil). Federal Judge in Florianópolis, Santa Catarina, Brazil. E-mail: jacobsen@univali.br.

[2] LLM (Master of Laws) student at the University of Vale do Itajaí - UNIVALI (Brazil) in a dual degree program with Widener University - Delaware Law School (USA). Specialist in Criminal Sciences, qualified for higher education, from Anhanguera University. Specialist in Judiciary Management by Universidade do Sul de Santa Catarina. Graduate Law degree (JD) from Universidade Federal de Santa Catarina. Judge holding the 2nd Civil Court of the Joinville District, Santa Catarina, Brazil.

[3] LLM (Master of Laws) student at the University of Vale do Itajaí – UNIVALI (Brazil), in a dual degree program with Widener University - Delaware Law School (USA). Graduate Law degree (JD) from Faculdade de Direito de Curitiba (Unicuritiba). Register of Deeds in São Bento do Sul, Santa Catarina, Brazil.

[4] POLLEIT, Thorsten. **A diferença básica entre globalismo e globalização econômica:** um é o oposto do outro. Mises Brasil, 1 Mar. 2017. Available at: https://www.mises.org.br/Article.aspx?id=2639. Accessed on: 20 Out. 2019.

The United Nations Organization issued the Bangalore Principles of Judicial Conduct[5], edited by the United Nations Judicial Integrity Group on April 2001, in Bangalore, and approved on November 2002 in The Hague. But do cultural differences between the peoples of the United Nations make it possible to establish a valid universal code of judicial ethics, such as the Bangalore Principles of Judicial Conduct?

The aim of this chapter is to demonstrate the legitimacy of these principles formulated within the United Nations as vectors for the shaping of national judiciary branches, not to exterminate their differences and peculiarities, but in a way that they can be perceived as whole internationally.

The present work, therefore, does not start from a pretense of globalism, but rather from a realistic perspective on the needs of economic players, internationally, regarding the integrity of a nation's institutions to be seen as attractive to investments, in order to allow these countries to take advantage of economic globalization in its positive aspect. The chapter deals with the idea of the validity of these principles not as mandatory and binding, but as guiding and persuasive, that is, as principles of transnational law to be internalized by nations within the limits of what local culture and reality allow.

To achieve that purpose, it is divided into two parts. The first one is on the concepts of globalization, globalism, anti-globalism, nationalism and the actual scarce respect for United Nation's international authority; the second one addresses transnational legal standards of judicial integrity.

1. THE UNITED NATIONS ORGANIZATION, GLOBALIZATION, GLOBALISM, ANTI-GLOBALISM, AND NATIONALISM

The United Nations is an intergovernmental organization created to promote international cooperation. A replacement for the League of Nations, the organization was established on October 24, 1945, after the end of World War II, with the intention of preventing another conflict like that. Its goals include maintaining security and world peace, promoting human rights, assisting economic development and social progress, protecting the environment and providing humanitarian aid in cases of famine, natural disasters and armed conflict[6].

Political theory classically distinguishes *influence* and *power* as forms of social control, the first meaning the mode of control that determines the action of the other by focusing on one's choice, and the second, the mode of control that determines behavior of the other, making it impossible to act differently[7]. The United Nations Organization seems to exercise not only influence over its member's decisions, but also some effective power, though its kind of power fits

[5] The Bangalore Draft Code of Judicial Conduct 2001 was adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, on Nov. 25 and 26, 2002. Available at: https://www.unodc.org/pdf/corruption/bangalore_e.pdf. Accessed on: 25 Feb. 2019.

[6] UNITED NATIONS. **ONU Brasil**. Available at: https://nacoesunidas.org. Accessed on: 27 Oct. 2019.

[7] BOBBIO, Norberto. **A Era dos Direitos**. Elsevier Editora Ltda. Edição do Kindle. Position 977.

into the concept of persuasive power. As defined by Paulo Márcio Cruz, persuasive power is the ability to obtain obedience by unifying preferences and priorities, convincing those who must obey of the fairness, correctness, and goodness of the projected order model[8]. The author also explains that ideology is the instrument of this kind of power, which might enlighten the reasons for the legitimacy crisis of the United Nations authority. Indeed, the entity is accused by some more nationalist governments of been the embodiment of globalism, that is, an international entity whose agenda is to try to impose a centralized and authoritarian global arena of decision making.

For the purposes of this paper, despite academic criticism about this concept, globalism is a policy that sees the world as a propitious sphere of political influence with a bias of authoritarianism and internationalism. Besides the critics on this concept, there is also a growing discussion about it on the agenda of key countries around the world, such as the United States, Great Britain, Ukraine and even Brazil. The right wing of politicians and intellectuals in these countries has strongly criticized the role of supranational organizations capable of interfering with the sovereignty of countries in order to resolve conflicts or impose certain public policies. And, indeed, some attitudes of the United Nations and other international bodies on certain sensitive issues such as immigration policy, cultural issues, religious values, or controversial matters such as abortion, end up overriding their primary goals and advancing on the internal questions of sovereign nations.

On the other hand, globalization, as a predominantly economic phenomenon, seems to be a no-return path. According to Ian Bremmer, president and founder of Eurasia Group, a global political risk consulting and research firm, "In the past two decades, globalization has lifted 1 billion people out of extreme poverty. 90% of the world's infants. Because of globalization, a child born on the planet today has an average life expectancy of 70. Women and girls are being educated at unprecedented rates. This is astonishing and it's about globalization"[9]. Nevertheless, notwithstanding the undeniable economic advance brought by globalization, there is the necessary counterpoint to globalism and its negative reflexes. For example, it is observed that, despite the decrease in global poverty, one can see, especially in the most advanced economies, a continuous increase in income concentration. As already pointed out, those who struggle against globalism have real and concrete reasons to worry.

Besides, there is the concern of some that the fight against globalism could lead to exaggerated nationalism, like it was saw in the middle of the 20th century, especially in the period before the Second World War externalized by Fascism and Nazism. As described by writer Cristopher Dawson, “Whenever the spirit of fascism appears, it allies with the forces of militant nationalism. In Germany, as Herr von Binzer demonstrates, their analogues are the large semi-military national associations such as Stahlhelm, Jungdeutsche Orden and Werewolves, who reject

[8] CRUZ, Paulo Márcio. **Política, poder, ideologia e Estado contemporâneo**. 3 ed. Curitiba: Juruá Editora, 2003, p. 61-62.

[9] UNIVERSITY OF MARYLAND, **Robert H. Smith School of Business**. Why Globalism Isn't Globalization, 10 Apr. 2019. Available at: www.rhsmith.umd.edu/faculty-research/smithbraintrust/insights/why-globalism-isnt-globalization. Accessed on: 27 Oct. 2019.

the new German state as a 'republic of peddlers and gravediggers' and pin their hopes on a resurgence of national patriotic sentiment"[10]. However, it now seems rather unlikely that a certain degree of nationalism or anti-globalism can evolve into the extremism seen in the past. People have now real-time information; and most developed countries have solid democratic institutions and a tripartite system of separation of powers, segmented into executive, legislative and judiciary branches, to guarantee the maintenance of these democratic institutions on the grounds of checks and balances.

One way or another, the criticisms over the United Nations are not recent nor restricted to its eventual globalist purposes. There are criticisms about the effectiveness of its performance, its administrative organization, its diplomatic and political performance, scandals and even some moral relativism. Nevertheless, specifically in relation to globalism, the criticisms are old. Former French President Charles de Gaulle was already stating that a global security alliance such as the United Nations was not the best way to guarantee world peace by preferring direct defense treaties between countries[11]. At the same time, it is inexhaustible to highlight the important role of the United Nations and other international organizations in advancing international peace and security, the defense of human rights (Universal Declaration of Human Rights[12]) and environmental protection programs. That is why is so important to take measures aiming on increasing United Nations accountability and the legitimacy of its decisions.

The United Nations reform has been under discussion for a long time. A central point discussed today refers to the representativeness of this body in its two main organs: the Security Council and the General Assembly. The United Nations Security Council (UNSC) has as its main scope the maintenance of international peace and security. The body is made up of 15 members, ten nonpermanent, elected by the United Nations General Assembly (UNGA) for two-year terms (with no possibility of immediate reelection), and five permanent veto-holding members (China, United States, France, the United Kingdom, and Russia). The composition and structure of the United Nations Security Council portray the post-World War II context, with the conflict-winning powers in permanent membership, and the under-representation of developing countries, particularly Africa and Latin America[13]. The United Nations has an agenda of reduced reforms, reduction of internal bureaucracy, cost reduction, peacekeeping and security. In the words of UN Secretary-General Antonio Guterres "The goal of reform is a 21st century UN, focused more on people and less on processes, more on delivery and less on bureaucracy. The real test of reform

[10] DAWSON, Christopher. **Inquéritos sobre religião e cultura**. Tradução de Fábio Faria. São Paulo: É Realizações, 2017, p. 43.

[11] GERBET, Pierre. **Naissance Des Nations Unies**. La Fondation Charles De Gaulle (charles-de-gaulle.org), 1995. Available at: https://web.archive.org/web/20090710122708/http://www.charles-de-gaulle.org/pages/l-homme/dossiers-thematiques/1944-1946-la-liberation/restaurer-le-rang-de-la-france/analyses/naissance-des-nations-unies.php. Accessed on: 27 Oct 2019.

[12] UNITED NATIONS. **Universal Declaration of Human Rights.** Available at: http://www.onu.org.br/img/2014/09/DUDH.pdf. Accessed on: 22 Feb. 2019.

[13] BRASIL. **Ministério das Relações Exteriores (Itamaraty)**. Reformando o Conselho de Segurança da ONU. Available at: http://www.itamaraty.gov.br/pt-BR/politica-externa/paz-e-seguranca-internacionais/4779-reformando-o-conselho-de-seguranca. Accessed on: 27 Oct. 2019.

will be measured in tangible results, in the lives of those who provide services - and in the trust of those who support our work"[14].

Thereby, with a broad reform of the United Nations, both in its representativeness as in its structure and way of acting, it is possible to reconcile an anti-globalization proposal while enhancing the role of international organizations. This idea may seem a little contradictory at first glance, but building a balance between the support of globalization and some publicly accepted public policies and respect for the sovereign decision of nations on more sensitive and local issues tends to be a feasible arrangement. This would certainly help to increase United Nations persuasive power, to rescue the legitimacy of its decisions and the trust of those who support its work, as well as to promote the respect for its international authority.

2. THE TRANSNATIONAL LAW ON JUDICIAL INTEGRITY

Just as there are universally accepted values to legitimize the Universal Declaration of Human Rights, there is also a universal consensus on the need for judges to keep both professional and personal life ethical standards that set them free of doubts as to their independence, impartiality, honesty, moral authority and also proficiency to resolve the conflicts submitted to them. So much so that the Universal Declaration of Human Rights[15] itself, in its art. 10, provides that "*Every human being shall have the right, in full equality, to a fair and public hearing by an independent and impartial tribunal, in order to decide his rights and duties or foundation of any criminal charge against him*". Difficulty rests, however, in the establishment of these universal ethical standards, given the great cultural diversity found from nation to nation. As Descartes noted, many things that seem very extravagant and ridiculous to one are nonetheless commonly accepted by other great peoples[16].

According to Norberto Bobbio's lesson, there are three ways in which values can be founded: a) to deduce them from a given constant objective, such as human nature; b) regard them as self-evident truths; and c) the discovery that at any given historical period they are generally accepted (precisely the proof of consensus)[17]. To this author, it is only after the Universal Declaration of Human Rights that one can have the historical certainty that humanity shares some common values. The Universal Declaration authorizes the belief in the universality of values, in the only sense in which such a belief is historically legitimate, that is, in the sense in which universal means not something objectively given, but something subjectively embraced by the universe of men[18]. That is precisely what seems to have happened when The Bangalore Principles of Judicial

[14] UNITED NATIONS. **ONU Brasil**. Reforma Da ONU, 14 Feb. 2019. Available at: https://nacoesunidas.org/acao/reforma-da-onu/. Accessed on: 22 Feb. 2019.

[15] UNITED NATIONS. **Universal Declaration of Human Rights**. Available at: http://www.onu.org.br/img/2014/09/DUDH.pdf. Accessed on: 22 Feb. 2019.

[16] DESCARTES, René. **Discurso do método**. Tradução de Nilton de Macedo. Mimética, 2019. Edição do Kindle. Posição 466.

[17] BOBBIO, Norberto. **A Era dos Direitos**. Elsevier Editora Ltda. Edição do Kindle. Posição 773.

[18] BOBBIO, Norberto. **A Era dos Direitos**. Elsevier Editora Ltda. Edição do Kindle. Posição 802.

Conduct were issued – the embracing of universal standards of judicial integrity by the universe of men.

The Bangalore Principles of Judicial Conduct[19] are then a perfect example of transnational law. According to Harold Hongju Koh, "Transnational law represents a kind of hybrid between domestic and international law that can be downloaded, uploaded, or transplanted from one national system to another."[20]. As for the classic definition created by Judge Philip Jessup, transnational law is "all law which regulates actions or events that transcend national frontiers". "This definition includes public international law, private international law, as well as "other rules which do not wholly fit into such standard categories"[21]. As an example, Koh cites the metric system, which cannot be defined as a domestic or a international concept, thus it really is both, a hybrid, a transnational idea[22].

In fact, "International law has expanded far beyond inter-state relations, as then understood. It is now a key component in transnational legal ordering and the creation of transnational legal orders"[23]. Thus, such as it can be said about the Universal Declaration, The Bangalore Principles of Judicial Conduct are something more than a doctrinal system, but something less than a system of legal norms[24], which is possible to define as a common ideal to be achieved by all peoples and nations[25]. In the end, these principles represent transnational legal values on judicial integrity, embraced by nations as universal standards, especially because of their declared intention of being a frame for national legal systems and local practices on judicial ethics.

The problem is that "Civil law systems as well as common law systems are deeply rooted in the idea that only states are able to legitimately create law"[26] and the international system, as it currently exists, cannot even demand the implementation of its directives as a requirement for a State to belong to the international community[27]. At the end of the day, as the international declarations of rights[28], those principles of judicial integrity, in practice, represent only general directives of action for an undetermined future, with no guarantee of achievement beyond the

[19] The Bangalore Draft Code of Judicial Conduct 2001.

[20] KOH, Harold Hongju. **Why Transnational Law Matters**. Penn State International Law Review. Volume 24. Number 4, 05/01/2006, p. 753.

[21] SHAFFER, Gregory; COYE, Carlos. From International Law to Jessup's Transnational Law, From Transnational Law to Transnational Legal Orders. **Legal Studies Research Paper Series n. 2017-02**. School of Law. University of California, Irvine, p. 1.

[22] KOH, Harold Hongju. **Why Transnational Law Matters**. Penn State International Law Review. Volume 24. Number 4, 05/01/2006. p. 745.

[23] SHAFFER, Gregory; COYE, Carlos. From International Law to Jessup's Transnational Law, From Transnational Law to Transnational Legal Orders. **Legal Studies Research Paper Series n. 2017-02**. School of Law. University of California, Irvine, p. 9.

[24] BOBBIO, Norberto. **A Era dos Direitos**. Elsevier Editora Ltda. Edição do Kindle. Position 846.

[25] BOBBIO, Norberto. **A Era dos Direitos**. Elsevier Editora Ltda. Edição do Kindle. Position 848.

[26] MAURER, Andreas. **The Creation of Transnational Law – Participatory Legitimacy of Privately Created Norms**. Paper presented at the conference "Postnational Rulemaking between Authority and Autonomy", University of Amsterdam, 20 and 21 September 2012, p. 9.

[27] BOBBIO, Norberto. **A Era dos Direitos**. Elsevier Editora Ltda. Edição do Kindle. Position 1651.

[28] BOBBIO, Norberto. **A Era dos Direitos**. Elsevier Editora Ltda. Edição do Kindle. Position 1592.

goodwill of states, and with no basis for support other than pressure from international public opinion or non-state agencies.

To Bobbio, in order for a *vis directive* to achieve its own purpose, the exerciser must have a great deal of authority (if no reverential fear, at least respect); or/and the one upon which it is exercised must be very reasonable, that is, it must have a general disposition to regard as valid not only the arguments of force but also those of reason[29]. The current crises of trust in the United Nations ideological purposes explains part of the resistance, in a more nationalist approach, in accepting these principles as a valid source of law. However, even though a country has the option of not adopting the Bangalore Principles of Judicial Conduct as a framework for its national rules, this choice would have the potential to result in a lack of accountability in the international realm, in a way that the country may not be able to cope with the economic consequences of this choice. Hence the indispensability of adjusting both domestic legislation and the conduct of judges to transnational law and transnational legal standards of judicial ethics, which are currently defined as declared by the international community when positivized the Bangalore Principles of Judicial Conduct.

Raymond Wacks notes that, "In an increasingly anxious world, there is an understandable tendency to look to the law to resolve the manifold threats to our future"[30]. He cites some topics that have been on the agenda in recent years: the dangers of pollution, depletion of the ozone layer, global warming, among others[31].

One talks of globalization of law because it is really difficult to imagine a single facet of law that is untouched by globalization[32]; and since it is true that the role of each judge is to be a bridge between the law and life, as ponders Aharon Barak[33], "inside and outside the court, judges must act in a manner that preserves public confidence in them"[34].

Indeed, "The Globalization of economics and the society as such […] is challenging this tight link between law and the national state"[35]. That is why, "Empirically, international law has critical implications for the role of markets (and thus what the state does), the allocation of power among state institutions, the role of professions, and the development of transnational accountability mechanisms"[36]. Therefore, even to mitigate the harmful effects that bad qualification from international risk assessment agencies can cause on the economy of a country, every nation must

[29] BOBBIO, Norberto. **A Era dos Direitos**. Elsevier Editora Ltda. Edição do Kindle. Position 968

[30] WACKS, Raymond. **Law:** a very short introduction. 2nd Edition. New York: Oxford University Press, 2015, p. 129.

[31] WACKS, Raymond. **Law:** a very short introduction. 2nd Edition. New York: Oxford University Press, 2015, p. 129.

[32] WACKS, Raymond. **Law:** a very short introduction. 2nd Edition. New York: Oxford University Press, 2015, p. 127.

[33] BARAK, Aharon. **The judge in a democracy.** New Jersey: Princeton University Press, 2006, p. 18

[34] BARAK, Aharon. **The judge in a democracy.** New Jersey: Princeton University Press, 2006, p.110.

[35] MAURER, Andreas. **The Creation of Transnational Law – Participatory Legitimacy of Privately Created Norms.** Paper presented at the conference "Postnational Rulemaking between Authority and Autonomy", University of Amsterdam, 20 and 21 September 2012, p. 1.

[36] SHAFFER, Gregory; COYE, Carlos. From International Law to Jessup's Transnational Law, From Transnational Law to Transnational Legal Orders. **Legal Studies Research Paper Series n. 2017-02**. School of Law. University of California, Irvine. p. 17.

understand what is internationally expected from a Judicial Branch in terms of judicial integrity and reliability. In other words, in the globalized world, it is not enough that the Judicial Branch of a country is seen internally as whole, it is necessary that this integrity is also perceived internationally.

CONCLUSIONS

In conclusion, the Bangalore Principles of Judicial Conduct, ethical rules issued by the United Nations, are principles of transnational law to be internalized by nations within the limits of what local culture and reality allow, in order to improve Judicial Integrity. Even though these principles are not binding rules, but only guidelines and benchmarks, they represent transnational legal values that show what the international community expects from a country in terms of Judicial Integrity. That is why, despite of any criticism that can be made to the actual ideological purposes of the United Nations Organizations, these principles are a valid source of law, since they were embraced by nations as universal standards with the declared intention of been a frame for national legal systems and local practices on judicial ethics.

It is also important to point out that, in a country internal scope, a crisis of legitimacy of its Judicial Branch reduces its ability to enforce judicial decisions. The loss of people's trust in the Judicial Branch is deeply related to the belief that corruption is embedded in the judicial system and that the law is not interpreted equally for all, which undermines the sense of justice and compromises the respectability of judicial institutions. Indeed, a judicial system that does not work demoralizes a state or a nation before the national and the international community. Therefore, though only persuasive, in the view of the international community these principles are relevant in a way that the "encouragement" for its assimilation seems to be related to the need for a nation of been aware of the consequences – specially economic –of not being able to put them into practice. Thus, with the view to make its Judicial Branch perceived internationally as whole, a country must assure the assimilation of international ethical standards on judicial integrity.

As taught by Shaffer and Coye, international law "is not simply a technology that exists to solve discrete transnational problems; it shapes state law, institutions, professions, and social identity". And they continue: "It does so dynamically and recursively, often in response to considerable resistance"[37]. This resistance is expected when the international law to be "downloaded[38]" to the national system has the potential to restraint individual rights. Nevertheless, judges are citizens from whom it is required special effort to maintain reliability on the justice system, because they have been delegated a portion of one of the state's or nation's powers: the Judicial Power. That is the reason why individual rights of judges cannot be enjoyed to the same extent as if they were common citizens, from who not so much is demanded in terms of

[37] SHAFFER, Gregory; COYE, Carlos. From International Law to Jessup's Transnational Law, From Transnational Law to Transnational Legal Orders. **Legal Studies Research Paper Series n. 2017-02**. School of Law. University of California, Irvine. p. 9.

[38] KOH, Harold Hongju. **Why Transnational Law Matters**. Penn State International Law Review. Volume 24. Number 4, 05/01/2006. p. 745.

decorum and continuous personal enhancement. Thus, it is obviously necessary to improve codes of ethics and rules of conduct to be followed by judges.

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SHAFFER, Gregory; COYE, Carlos. From International Law to Jessup's Transnational Law, From Transnational Law to Transnational Legal Orders. **Legal Studies Research Paper Series n. 2017-02**. School of Law. University of California, Irvine, p. 1-19.

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LEGAL EDUCATION AND CIVIL PROCEDURAL PRACTICE IN BRAZIL AND IN THE UNITED STATES

Gilson Jacobsen[1]
Daniel Raupp[2]
Caroline Bündchen Felisbino Teixeira[3]

INTRODUCTION

In Greek antiquity, recalls Perissé[4], students used to be under a leafy tree and there they heard stories that the master told. And because they are under that tree, without windows or - on the contrary - with all windows, the students became an audience, in a creative, magical, theatrical space.

However - yesterday, today, always - “no mise-en-scène will be effective in the act of teaching, if the teacher, after capturing attention, does not know how to establish meaningful and pertinent connections with the past, present and future of students"[5].

And anyone who observes the teaching of law around the world soon realizes the very clear distinction that exists, at the origin, between schools in Europe, Latin America and countries like Japan and China, based on the Napoleonic code, and the United States school, whose basis is in the case method, implemented by Langdell, as points out Vieira[6].

They are models that still influence legal education around the world: one, based on the letter of the law and on the interpretation of doctrine, with more expository classes and that privileges students' deductive reasoning; the other, based on cases, through classes with an inquisitive or Socratic nature and, for that reason, values or develops the students' inductive reasoning. The first group is given the rule and asked for a solution; in the second, the problem occurs and, in view of the various solutions, the rules are sought[7].

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[1] Permanent Professor of Undergraduate, Master and Doctorate Courses at the Universidade do Vale do Itajaí – UNIVALI (Brazil). Visiting Professor at the Widener University - Delaware Law School (USA). Trainer of Trainers at the National School for the Training and Improvement of Magistrates – ENFAM, Brasília (Brazil). Federal Judge in Florianópolis, Santa Catarina, Brazil.

[2] SJD student at Universidade do Vale do Itajaí - UNIVALI (Brazil). Master of Laws (LLM) from Universidade do Vale do Itajaí - UNIVALI (Brazil), in a dual degree program with Widener University - Delaware Law School (USA). Graduate Law degree (JD) from Universidade Federal de Santa Catarina. Federal Judge in Laguna, Santa Catarina, Brazil.

[3] LLM student at Universidade do Vale do Itajaí - UNIVALI (Brazil) in a dual degree program with Widener University - Delaware Law School (USA). Specialist in Criminal Sciences, qualified for higher education, by Anhanguera University. Specialist in Judiciary Management by Universidade do Sul de Santa Catarina. Graduate Law degree (JD) from Universidade Federal de Santa Catarina. Judge holding the 2nd Civil Court of the Joinville District, Santa Catarina, Brazil.

[4] PERISSÉ, Gabriel. A arte de ensinar. 2, ed. rev. e atualizada. São Paulo: Saraiva, 2012. p. 26

[5] PERISSÉ, Gabriel. A arte de ensinar. 2, ed. rev. e atualizada. São Paulo: Saraiva, 2012. p. 27. Free translation [original in portuguese: “nenhuma mise-en-scène será eficaz no ato de ensinar, se o professor, após captar a atenção, não souber estabelecer ligações significativas e pertinentes com o passado, o presente e o futuro dos alunos”].

[6] VIEIRA, Oscar Vilhena. Desafios do ensino jurídico num mundo em transformação: o projeto da Direito GV. In: FEFERBAUM, Marina; GHIRARDI, José Garcez (Organizadores). Ensino do direito para um mundo em transformação. São Paulo: Fundação Getúlio Vargas, 2012. p.22.

[7] VIEIRA, Oscar Vilhena. Desafios do ensino jurídico num mundo em transformação: o projeto da Direito GV. In: FEFERBAUM, Marina; GHIRARDI, José Garcez (Organizadores). Ensino do direito para um mundo em transformação. São Paulo: Fundação Getúlio Vargas, 2012. p. 22-23.

In a certain way, there is a historical explanation for that conformation of the first model, which dates back to the Middle Ages: since the first law school, which is the University of Bologna, founded in the year of 1,088, the training of lawyers was very much associated with the canon law and a revisit to Roman law, through the scholastic method and glosses more concerned with a general theory than with the practice of law. This dogmatic model of legal education would influence the whole of continental Europe, Latin America and other countries, including Asia, all with legal systems of tradition so-called civil law. Brazil is an example of a country that followed this model, focusing on the study of laws, through doctrine[8].

In the United States, with a tradition in the common law system, "not having a corpus of positive laws, like the French or the Germans, Langdell understood that it was necessary to look at judicial decisions to find the principles of his science of law"[9].

It is curious to see, as Schubert notes,[10], that the British victory over the French, in the French and Indian War, and the respective signing of the Treaty of Paris (1763), ending disputes between the two nations over the domination of North America, was determinant for the influence of the English common law system in the United States. A French victory would have resulted in the adoption of the French legal system in the then colonies of the Atlantic coast.

In any case, according to Wacks[11], it is always important to emphasize that Law cannot be well understood - nor well taught, we would complete - without awareness of its multiple dimensions: social, political, moral and economic ones. And whoever proposes to study legal theory or jurisprudence always seeks to discover these philosophical elements that show the complex phenomenon of Law and the legal process.

Taking into account those dimensions of law is essential in its day-to-day application; especially in times of change. After all, in addition to its fragile formalism, Law reveals to us who we are and what we do[12].

By the way, Bodnar and Cruz[13] have the exact perception that judicial activism, as experienced in Brazil and in several other countries in South America and Europe, with the transfer of decision-making powers from other powers to the Judiciary, is a phenomenon that comes not

[8] VIEIRA, Oscar Vilhena. Desafios do ensino jurídico num mundo em transformação: o projeto da Direito GV. In: FEFERBAUM, Marina; GHIRARDI, José Garcez (Organizadores). Ensino do direito para um mundo em transformação. São Paulo: Fundação Getúlio Vargas, 2012. p. 23

[9] VIEIRA, Oscar Vilhena. Desafios do ensino jurídico num mundo em transformação: o projeto da Direito GV. In: FEFERBAUM, Marina; GHIRARDI, José Garcez (Organizadores). Ensino do direito para um mundo em transformação. São Paulo: Fundação Getúlio Vargas, 2012. p. 24.

[10] SCHUBERT, Frank August. Introduction to Law and the Legal System. 11. ed. Stamford: Cengage Learning, 2013. p. 8.

[11] WACKS, Raymond. Law: a very short introduction. 2. ed. New York: Oxford University Press, 2105. Preface, p. XV.

[12] WACKS, Raymond. Law: a very short introduction. 2. ed. New York: Oxford University Press, 2105. Preface, p. 3.

[13] BODNAR, Zenildo; CRUZ, Paulo Márcio. A Commolização do Direito Positivo, o Ativismo Judicial e a Crise do Estado. **Novos Estudos Jurídicos** - Eletrônica, Itajaí, Vol. 21 - n. 3, p. 1332-1351 - set-dez 2016. p. 1343, retrieved from https://siaiap32.univali.br/seer/index.php/nej/article/view/9700/5451, in 15 Apr. 2020. Free translation (in the original: "[…], com um evidente processo gradativo de emparelhamento de fontes primárias do direito entre a lei posta e as decisões judiciais").

only giving it great prominence, but also bringing Civil Law closer to Common Law, “[…], with an evident gradual process of pairing primary sources of law between the law put and the judicial decisions”.

The purpose of this study, however, is not so philosophical, but rather to elaborate a brief comparison between legal education in Brazil and in the US, pointing out the most significant differences in the authors' view, as well as making some comparisons between the civil procedural systems in both countries. Something straightforward and practical, which makes the main differences in legal education in both countries very clear to law students and researchers in general; and, in addition, the work that reveals how these differences end up, also, resulting in very different civil procedural systems in each land.

To do so, in the first part, the chapter reports the legal education and legal practice in Brazil and the US, focusing on higher education in both countries and the requirements for professional practice in law. In the second part, the text deals specifically with the civil procedure in both countries: criteria for determination of civil jurisdiction, stages of civil procedure (service of process, pleadings, pretrial and trial), focusing on the discovery phase.

The method used in the investigation phase and in the preparation of this report was inductive; and the research technique was that of bibliographic review, carried out with research in books, articles and legislation related to the covered topics.

1. LEGAL EDUCATION AND LEGAL PRACTICE

1.1 United States of America

To graduate in Law in the United States the student will have to take:

a) 12 (twelve) years of basic studies, eight of them being "primary school" and four of "high school";

(b) 4 (four) years of "college";

(c) 3 (three) years of legal studies in a Law School.

Admission to the law school is based on the candidate's academic performance, and based on the score required on each university in the specific exams. The process is highly competitive because, in general, the reputation of the university is a determining factor for the quality of employment and salaries after graduation.

The three years of law school are intensive, requiring the presence of the student almost on a "full-time" basis.

Unlike other countries, in the United States, law school gives the graduate not a bachelor degree, but a *Juris Doctor,* or *JD*.

Upon graduating from Law School, the student must submit to an examination before the respective "Bar", for purposes of qualification to the professional practice. Each state has its

association, so the candidate must submit to the examination for each state where he or she wishes to practice. That is the reason why, according to the federal system, each state has its autonomy fully preserved, including the legal system, Law Schools are more focused on studies of local law.

The teaching method is based on questions and answers, leaving to the professor the functions of organizer, mediator and evaluator of the debates that he puts forward in the classroom. Therefore, it is essential that the students be prepared in advance, reading, processing and, most importantly, analyzing the material previously indicated.

Thus, in practice, classes begin with the professor choosing one of the students and asking about the facts of a particular case, always starting from the premise that everyone has read the material in advance. Based on the answers, the professor asks other questions and, therefore, without teaching directly what the law is, the system encourages each one to think about the applicable norm, the rationality of its application and its effectiveness within the legal system.

Like any jurisdiction that is based on common law, the learning of laws from real cases is a constant and, as such, essential part of US legal education. So that the students can organize and better prepare themselves, at the beginning of the course everyone is taught to develop brief summaries of the cases used in class.

The “briefs” guide the students in their professional lives as well. They cannot be longer than one or two pages and contain the title of the case (the names of the parties), a sentence or two with the facts, a summary of procedural events up to the situation of the case, legal issues raised, the decision and rationale of its application, the legal norm created, and, if applicable, a summary of the opinions.

To research cases, statutes, and legal papers, there are two important publishers in the legal field: WestLaw and LexisNexis. Both are private companies. For professionals and law firms, the services offered by these companies are highly expensive. For students, the service is free of charge. The intention is to make future professionals dependent on the aforementioned research tools, which they will later acquire in their professional lives[14].

1.2 Brazil

To graduate in Law in Brazil the student will have to take:

a) nine years of elementary school;

b) three years of high school;

c) five years of law school.

[14] SAMPAIO, Rômulo Silveira da Rocha. Breve Panorama do Ensino e Sistema Jurídico Norte-Americanos, retrieved from https://direitorio.fgv.br/sites/direitorio.fgv.br/files/file/Breve%20Panorama%20do%20Ensino%20e%20Sistema%20Jur%C3%Addico%20Norte-Americanos.pdf, in 01 Apr. 2019.

Unlike the US, the student does not go to “college”, that is, he or she goes straight from high school to law school, which can sometimes be a problem, as a teenager will have to choose the profession that will follow for the rest of his or her life. Admission to law school requires taking a test, called “vestibular”.

Also unlike the US, the best law schools are, in general, public (federal universities), where competition for admission is higher, as they are also free of charge.

The five years of legal studies are usually held part-time, morning or evening, allowing students to take internships since the beginning of law school.

After graduating, the student becomes a bachelor in law, but in order to be able to advocate, he needs to take a national examination to be admitted to the Brazilian Bar Association (OAB). The examination is the same throughout the country, since states have little autonomy to legislate. Although Brazil is a federal republic, the law is almost all national, that is, the same substantive and procedural rules are applied in the most varied states.

Another option for the student is to continue postgraduate studies, such as a master's and doctorate degree, or to apply for a public competition for other legal careers, such as judge, public prosecutor, or public defender. These public competitions are quite disputed, as they guarantee stability, good salary and are life tenure.

The teaching method in the law school is basically “expository”. The professor presents concepts, principles, deductions or statements from which conclusions or consequences are drawn. It is almost always the teacher who draws conclusions.

The process of teaching is focused on the teacher and the classes follow the structure of steps, in which each step is initiated by the teacher who provides information and poses questions.

The complementation of the material taught in the classroom is made by the student himself, using the bibliography suggested by the teacher. The assessment is usually done by written tests.

As it is a civil law system, teaching of law in Brazil is based on statutes, treatises and textbooks, and, to a lesser extent, on cases. The cases are usually searched by the students themselves on specialized websites maintained by the courts.

The school year is divided into two semesters (usually February to June, and August to December), and in each semester the student has to complete the compulsory credits defined by the university. Most universities also require the student to take optional credits at his or her choice to complete the course, and to participate in some legal practice program or internship.

2. CIVIL PROCEDURE

Before entering into the comparative study of civil procedure in Brazil and in the US, it is important to identify, even briefly, the criteria for determining civil jurisdiction in these countries.

2.1. Criteria for determination of civil jurisdiction in Brazil

In order to determine the jurisdiction of the court that is able to adjudicate the case and to hear a possible appeal, one must first verify in the constitutional text which of the "judiciary bodies" is invested with judicial power: federal court, labor court, electoral, military or state court. Following the definition of the competent "branch", one must analyze, within the respective statute, which the rules of competence are.

In Brazilian civil procedure, the rules of delimitation of jurisdiction are provided in the Code of Civil Procedure (CPC) of 2015, in Articles 42 to 53, which distinguish competence on the grounds of value and matter, functional competence and territorial jurisdiction.

Regarding functional jurisdiction, it is necessary to first examine whether there is a constitutional provision that assigns original jurisdiction to a given court. Brazilian Federal Constitution, for example, assigns original jurisdiction to the Supreme Court (Article 102, I), to the Superior Court of Justice (Article 105, I), and to the Federal Regional Courts (Article 108, I) for the adjudication of certain cases.

Secondly, it is necessary to inquire whether the question relates to the competence of so-called "special court" (labor, electoral or military), according to the commands of the Federal Constitution (Articles 114, 121 and 124, respectively), or to the "common court" (federal or state). In the latter case, only if there is no constitutional provision for the jurisdiction of federal courts (Article 109, I), state courts exercise their jurisdiction (Article 125). The jurisdiction of the state courts, therefore, is established by exclusion.

After the jurisdiction has been settled by the functional criterion, the determination of the court having jurisdiction over the case is guided by the criterion of territorial jurisdiction, that is, the forum where the civil action must be filed. The usual forum is the defendant's domicile (CPC, Article 46)[15], but there may be a special forum that prevails over it, such as the location of a real estate property (CPC, Article 47)[16].

The same rule applies to cases in which the federal government is the plaintiff, which must be filed in the forum where the defendant is domiciled (Article 109, § 1, of the Federal Constitution). If the federal government is sued, the action can be filed in the venue of the

15 Art. 46. An action based on personal rights or real rights to personal property shall be filed, as a rule, in the venue where the defendant is domiciled. § 1 If the defendant has more than one domicile, he or she can be sued in any of those venues. § 2 If the defendant's domicile is uncertain or unknown, he or she can be sued where he or she may be found or in the venue of the plaintiff's domicile. § 3 When the defendant does not have domicile or residence in Brazil, the lawsuit shall be brought in the venue of the plaintiff's domicile and, if the plaintiff is also resident outside Brazil, the lawsuit shall be brought in any venue. § 4 Where there are two (2) or more defendants in different domiciles, they are to be sued in any of the venues of their domiciles, at the plaintiff's discretion. § 5 Tax foreclosures shall be brought in the venue where the defendant is domiciled or resident, or wherever he or she may be found.

16 Art. 47. Actions brought on the grounds of real property rights, the venue where the property is located has jurisdiction. § 1 The plaintiff may opt for the venue where the defendant is domiciled or for the venue chosen if the dispute does not involve property rights, neighboring property rights, servitude, surveying and demarcation of land and novi operis nuntiatio. § 2 Actions to recover the possession of real property are to be filed in the venue of its location, whose court has exclusive jurisdiction. (...)

plaintiff's domicile, of the occurrence of the act or fact that gave rise to the claim, of the location of the property or in the Federal District (Article 109, § 2, of the Federal Constitution).

2.2. Criteria for determination of civil jurisdiction in the United States

The U.S. Constitution does not specify the different bodies of the judiciary power and their respective competences, but only the description of the federal judiciary, its divisions and jurisdiction (Article III). The regulation of the local judiciary is provided in the constitutions and laws of the respective states.

In civil procedure, a court has jurisdiction when it has the power over the persons of the plaintiff and defendant (personal jurisdiction) or the property that is in dispute ("in rem" jurisdiction), and, for federal courts, also over the subject matter of the case (subject-matter jurisdiction).

The determination of personal jurisdiction is a constitutional imposition built by the U.S. Supreme Court to enable a binding decision against the defendant. The purpose is to prevent a state from imposing its decisions on residents of another state without fair criteria. This demonstrates the importance that U.S. law attaches to federalism, autonomy and state sovereignty. In Brazil, this discussion is not relevant, not seeing any injury of sovereignty of one state on the other the imposition of judicial decisions on a non-resident. In fact, in Brazil there is little importance in this regard to the state of residence of one of the parties, except to define jurisdiction for the defendant's domicile, as explained above.

There are basically three ways of establishing jurisdiction over the person: showing that the party was served within the state where the action was filed (forum state), the express or implied consent of the jurisdiction by the plaintiff or the defendant, or demonstrating "sufficient minimum contacts" of the defendant with the state in which the lawsuit was filed.

A court also has jurisdiction over a property (real or personal) located within the boundaries of the state, when this property is the subject of the action ("in rem" jurisdiction). In that case, it does not matter if one of the parties is a non-resident.

On the other hand, it is not enough for a federal court to have jurisdiction over the parties or property involved in the dispute. It also must have jurisdiction over the matter. At this point, the U.S. Constitution specifies the cases that can be brought to federal courts (Article III, Section 2). However, since this constitutional provision is not considered self-executing, the U.S. Congress has reduced its scope by statute, restricting federal jurisdiction to two main situations: diversity jurisdiction and federal question jurisdiction.

The first situation occurs when the civil action involves citizens from different states or U.S. citizens and aliens, and the matter in controversy exceeds the sum or value of $75,000. The diversity must be complete, that is, all the defendants or all the plaintiffs must be from another state. This type of jurisdiction is provided for in title 28 § 1332 of the Code of Laws of the United

States of America (U.S. Code or U.S.C.), and was created on the basis of the idea that federal courts would be fairer to examine a dispute between citizens of different States.

The second situation is provided for in title 26 U.S.C. § 1331 and occurs when the civil action arises under the Constitution, laws, or treaties of the United States, as essential to the case.

The two situations mentioned above confer original jurisdiction on the federal courts, which means that lawsuits can be filed directly in a federal court. It is not, however, an "exclusive" jurisdiction, since the plaintiff has the option of filing in the state court lawsuits that would qualify for federal jurisdiction, although the defendant, in this situation, is authorized to "remove" the entire case into federal court, providing certain requirements (removal jurisdiction).

3. STAGES OF CIVIL PROCEDURE

3.1 Service of process and pleadings

In the first stage in the US, the defendant is summoned to appear before the Court. Usually, with the summons the defendant is given the complaint, which contains the plaintiff's postulation, which constitutes the first pleading. The complaint contrasts with the answer, the first pleading of the defendant, in which the defendant can also counterclaim[17].

If there is a counterclaim, the plaintiff can reply. The complaint, the answer, and eventually the reply, constitute the pleadings phase.

Pleadings are the requirements by which litigants bring the case to court. The way in which it is pleaded depends on the court where it does so, since the US has a federal system, which allows states to have specific rules of procedure.

The initial pleading in the pretrial phase has four goals: (a) summons; (b) disclosure of facts; (c) formulation of the cause; (d) sorting to determine the size of the litigation. Depending on the size of the litigation, more or less details will be required to enable judgment of the case.

The judge usually does not participate in the pretrial phase, except when requested (motions), when he will have a supervising role, considering that, like the pleadings, the pretrial is merely preparatory, aiming at the trial.

In Brazilian Civil Procedure, the service of process or summons is an act through which a defendant is called to join the proceedings. It is done by the court and shall be served: I – by mail; II – by a process server; III – by the clerk of the court or the head clerk, if the defendant appears at the court clerk's office; IV – by publication; V – by electronic means, in accordance with the law.[18]

After the plaintiff files a complaint, the defendant is to be summoned in order to file an answer and state the evidence that he or she intends to produce. In the answer, the defendant

[17] Farnsworth, E. Allan. An Introduction to the Legal System of the United States. Fourth Edition. Oxford. 2010. Kindle version, p. 111.

18 CPC, Article 246.

can lawfully file a counterclaim to manifest his or her own claim, connected to the main action or to the grounds of the defence. Then, the plaintiff can reply regarding the defendant's allegations and the documents attached to the answer.

This is called the “postulatory” phase, where the judge must already try to reconcile the parties, before entering the stage of production of evidence.

3.2 Pretrial

If the lawsuit is able to proceed, the Brazilian judge shall, in a pretrial decision to organize the case: I – solve pending procedural issues, if any; II – define the points of fact which shall be subject to evidentiary activities, specifying the admissible evidentiary procedures; III – define the assignment of the burden of proof; IV – define the points of law relevant to the decision on the merits; V – schedule, if necessary, the trial date.[19]

Therefore, in Brazil the judge participates actively in the evidentiary phase and determines the entry into the phase of production of evidence.

In this regard, there is a notable difference between Brazilian and American legal systems, since in the United States the judge plays a different role than the one performed by the Brazilian judges.

In Brazil, the judge conducts the phase of evidence production, determining those that he considers useful to the case solution, inquiring witnesses or taking other measures to supplement the evidence.

In the US, the judge is not very active at this stage.

On one hand, this measure guarantees impartiality in the trial, since the judge does not know the evidence until this moment. On the other hand, the Brazilian judge, as he has actively participated in the production of evidence, knows better the case that is submitted to his decision and can focus on the evidence that really matters in the judgment phase.

Another important difference is that, in the U.S. legal system court proceedings are more costly for the parties. To take part in civil actions, where the chance of victory is not evident, implies high expenses with attorneys' fees. Thus, lawyers seek to guide their clients into litigation only if they have a solid case and robust evidence. For the court, there is no "case" until it is proven to the court that the conflict deserves attention from the judicial system and that the evidence will be sufficient to determine a verdict.

In Brazil, however, a person who cannot afford to pay court costs, procedural expenses and counsel fees is entitled to free legal aid, in accordance with the law.[20] That may explain why there are far more lawsuits than in the US.

19 CPC, Article 357.

20 CPC, Article 98.

3.2.1 Discovery phase

For Brazilians to better understand the Discovery phase of Civil Procedure in the United States, it is necessary to keep in mind the existence of juries for civil cases. So, it is not accurate to think of Discovery as a preliminary phase for gathering evidence. In fact, when Discovery starts, the action has already commenced, summons upon the defendant were already served, as well as initial pleadings, motions and orders have already taken place. The part related to the discovery that happens before the beginning of the processes is called information governance. This stage exists when the client knows that there will be a lawsuit and the lawyer will explain what kind of information, documents and data should be preserved. The following phases (identification; preservation and collection; processing, review and analysis; production; and presentation) all take place after the law suit has been filed[21]. That is why the better analogy with Brazilian procedural rules is not with civil procedure rules, but with the specific criminal procedure rules what in Brazil is called the first phase of a jury trial procedure.

Having said that, it is possible to comprehend that Discovery is the phase of civil procedure destined to the production and presentation of evidence, in order to prepare the case to a decision about rather a case needs or should go to trial. During Discovery, depositions to perpetuate testimony are taken, even by oral examination or by written questions; parties are interrogated; documents are exchanged among lawyers, as well as electronically stored information; things and people are examined; land is inspected, etc. Once the evidence produced by and among the lawyers is presented to the Court, if the parties cannot reach an agreement nor the judge issues a summary judgment, a jury trial may take place.

It is also important to note that much evidence is in digital form nowadays. A case can depend on a lawyer's ability to conduct **electronic discovery** (*e-discovery*).

Although this is a "hot topic" in the U.S., in Brazil, only in 2015 the new Code of Civil Procedure (CPC) specifically addressed this issue, albeit superficially.

Brazilian procedural rules say that electronic documents produced and kept in accordance with the specific legislation shall be admissible. It also states that the usage of electronic documents in conventional procedure shall depend on their conversion to a printed format and the verification of their authenticity, under the law. The judge shall assess the probative value of the unconverted electronic document, the parties being assured access to its contents.[22]

3.2.2 Disputes over facts

The very existence of jury trials for civil cases reveals an important difference between American and Brazilian civil procedure. In America, a judge is not supposed to have to deal with fact issues. Since a dispute over facts remains after Discovery, parties are entitled to a jury trial.

21Electronic Discovery Reference Model, retrieved from https://www.edrm.net/frameworks-and-standards/edrm-model/edrm-wall-poster/, in 22 Feb. 2019.

[21] CPC, Articles 439, 440 and 441.

The judge will enforce the law after the jury issues its decision over the facts, but he or she is not to be occupied trying to figure out what really happen when the facts are brought to court by the parties with different versions. However, that is not how disputes over facts are decided in Brazil. As there are not jury trial for civil cases, it is the judge's task to pursuit the truth about the facts. The judge acts in every civil case in Brazil as a judge acts in America when the parties agree to a bench trial: he or she has to first decide what the facts are and, only after that, enforce the law.

But this is not the only difference. In America, lawyers are responsible for producing all the evidence. There is no need to be in front of a judge to take a valid deposition. It is not necessary to be a judge to interrogate a party. Lawyers can request documents from each other, and even from third parties, without the necessity of a judicial order to be attended. Electronically stored information is got to be preserved and produced, even when the judge is not aware of its existence. Things, land and people can be examined with no need of a judge's intervention. In fact, the judge is really not supposed to get involved in all this process of discovering the truth, in order not to be contaminated. Unfortunately, that is not how things work in Brazil.

Although the Brazilian Constitution expressly provides that "The lawyer is indispensable to the administration of justice…"[23], the law in Brazil does not give lawyers as much big of a role in the production of evidence. The Civil Procedure code was very recently modified and just now contains the possibility of agreements among parties that could lead to a procedure similar to Discovery, but in the end of the day that does not happen, since it is completely up to the parties to decide. The judge cannot delegate to the lawyers these tasks if they are not willing to accept it. So, what happens is that all the evidence is produced inside the records, in front of the judge or depending on his or her active participation. This deprives judges from valorous time that could be better used on deciding about the law, instead of having to deal with fact disputes.

3.3 Trial

Ordered and prepared the civil action, the trial phase begins, which constitutes the most important stage of the case. In the US, the matters of fact are usually decided by the jury, if it is a jury trial, and the questions of law are on behalf of the judge.

Evidence is produced in the trial, witnesses are questioned by the parties and only supplemented by the judge, and debates are held in this phase.

Even though the basic principles of procedural science may be contained in the trial, it is also true that, despite the evolution that has been observed in recent times, when the judge's role

23BRAZIL. CONSTITUTION (1988). Constitution of the Federative Republic of Brazil. 3 ed. Brasília, DF: Câmara dos Deputados, 2010, Article 133.

in production of evidence is seen more clearly, the process is excessively at the mercy of the personal skills of lawyers, which could cause considerable losses to the parties.[24]

In Brazil, there is no jury trial in civil actions. The matters of fact are all decided by the judge. The judge, "ex officio" or at the party request, must determine what evidence is necessary for a judgment. The judge shall deny, in a reasoned decision, those procedures that are useless or merely protractive.

The judge may allow the usage of evidence produced in another action, attributing it the value deemed appropriate, observing the principle of "audi alteram partem."

On the designated date and time, the judge shall declare the trial open and order that the parties and their respective counsel, as well as others required to participate, be called. Having initiated the trial, the judge shall urge the parties to settle, regardless of any prior employment of other amicable dispute resolution methods, such as mediation and arbitration.

The judge exercises "police power" in the hearing, being responsible for: I – preserving the order and decorum of the hearing; II – ordering that those who engage in inconvenient conduct leave the courtroom; III – requesting the use of police force when necessary; IV – treating the parties, lawyers, members of the Public Prosecutor's Office and Public Defender's Office, and any other person participating in the proceedings with civility; V – record, with precision, in the minutes of the hearing, all the applications made.[25]

Oral evidence must be produced in the hearing, when are heard: the court-appointed expert and the retained experts, if it is the case; the plaintiff, followed by the defendant, who shall give personal testimony; the witnesses called by the plaintiff and by the defendant, who shall be examined.

The judge may waive the production of evidence requested by the party whose counsel or public defender did not attend the trial.

Upon the conclusion of the evidentiary stage, the judge shall call upon the counsel for the plaintiff and for the defendant, as well as upon the member of the Public Prosecutor's Office, when the latter's intervention is applicable, to speak, successively, for twenty minutes each, extendable by ten minutes at the discretion of the judge.

Following the oral arguments or submission of closing arguments, the judge shall render judgment at the trial or within thirty days.

As in the U.S. legal system[26], the losing party has to pay the costs of the successful party. Moreover, the judgment shall order the losing party to pay the fees of the prevailing party's

24 TEIXEIRA, Salvio de Figueiredo. Considerações e reflexões sobre o direito norte-americano, retrieved from https://www.direito.ufmg.br/revista/index.php/revista/article/viewFile/837/782, in 01 Apr. 2019.

25 CPC, Article 360.

[25] FARNSWORTH, E. Allan. An Introduction to the Legal System of the United States. Fourth Edition. Oxford. 2010. Kindle version, p. 120.

counsel. Fees shall be set at between a minimum of ten and maximum of twenty percent of the amount of the award, of the economic gain obtained or, if it cannot be measured, of the value of the claim adjusted by inflation..

CONCLUSIONS

There are significant differences in the legal education in Brazil and the US. Not only the length of the course, which in the US lasts two years longer than in Brazil, but also the teaching method adopted in law schools.

In the method adopted in the US there is greater participation of the students, with formulation of questions and answers, leaving to the professors the function of coordinator in the search of knowledge.

In Brazil, the classes are essentially expositive, focusing on the professor, responsible for transmitting the knowledge and indicating the materials for completing the study by the students.

These differences in methods are reflected not only in the academic field but also in the way legal professionals operate.

In American civil procedure, the involvement of lawyers is much more relevant at every stage of the case. The judge acts more as a coordinator than as a director. The parties are responsible for producing the evidence, reporting to the judge only in case of divergences between them.

In Brazilian civil procedure, the judge acts in the same way as the professor in the law school. The action is focused on the figure of the judge, who organizes and directs all phases of the proceedings, telling the parties what they should or should not do to achieve the desired result. This is burdensome to the judiciary and gives rise, among other reasons, to the immense number of lawsuits that currently exist in the country.

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SCIENTIFIC APPROACH TO LAW[1]

Orlando Luiz Zanon Junior[2]

INTRODUCTION

The present chapter aims to discuss the importance of adopting a scientific approach to the study of legal phenomena.

The present inquiry is justified because there is a divergence regarding the possibility of producing knowledge described as scientific in dealing specifically with law. The arguments to the contrary are usually centered on the fact of dealing with a field marked by its connection with moral issues and values, broadly affecting the policy and therefore not eligible for confirmation through empirical experiment, particularly due to the absence of a specific and feasible methodology for such. These typical features of legal subjects would thereby prevent producing knowledge liable to be confirmed by means of factual observation.

In spite of this criticism, this text intends to discuss the importance of proceeding with scientific rigor in legal studies, aiming at optimizing the social function of this field of research. The justification lies in the tendency to obtain a greater degree of safety and quality in applying regulations when the juridical bodies are based not only on metaphysical arguments, but mainly on conclusions founded in statistical methodology. In this respect, it should be pointed out on behalf of extracting jurimetric data which can indicate past and predictive trends of the results of regulations, with a view to attaining certain objectives and even preserving or encouraging certain axiological options.

With this intention, the first item aims to specify the concept of law, i.e., to outline the specific field of research concerned.

Having established the previous item, it is appropriate to start a second part to discuss, briefly and succinctly, the history of philosophy, in order to justify the adoption of a contemporary scientific concept.

The third item, finally, starts with considerations raised in the two previous ones to deal with the possibility of producing knowledge defined as scientific concerning legal issues.

Regarding the methodology, it is emphasized that in the investigation stage we used the inductive method, in the data processing phase we used the Cartesian method and the final text

[1] This text is the authorized english version of ZANON JUNIOR, Orlando Luiz. Sobre a importância de uma abordagem científica do direito. **R. do Instituto de Hermenêutica Jur. – RIHJ**. Belo Horizonte, ano 17, n. 26, p. 87-102, jul./dez. 2019.

[2] Juiz de Direito. Doutor em Ciência Jurídica pela UNIVALI. Dupla titulação em Doutorado pela UNIPG (Itália). Mestre em Direito pela UNESA. Pós-graduado pela UNIVALI e pela UFSC. Professor Programa de Pós-graduação da UNIVALI, da Escola da Magistratura de Santa Catarina (ESMESC) e da Academia Judicial (AJ). Membro da Academia Catarinense de Letra Jurídicas (ACALEJ).

was composed on the basis of deductive logic. In the various phases of the research, the techniques of referent, category, operational concept and bibliographic research[3] were employed.

Having established the outlines of this research, it should be noted that the present work was developed in the research line underlying Constitutional Principles and Policy of Law, of the Doctorate of the Postgraduation Program in Legal Science (PPCJ) of the Universidade do Vale do Itajaí (Univali) [University of Itajaí Valley].

1. CONCEPT OF LAW

This first passage aims to establish the semantic agreement about a concept of law, i.e., to delimit the specific field of research concerned. This stage is necessary, considering the historical variations about the issue, from conceptions of natural, positive and post-positive law.

According to the model of Natural Law, predominant approximately between the centuries V BC and XIX, the essential concept of law would lie in preparing fair laws and decisions[4]. The central concern was related to the quality of judicial production, which should correspond axiologically to the criteria of justice, through comparison with the so-called natural law, of cosmological or metaphysical features.

As an example, in the period of classical philosophy, Aristotles dealt with the distinction between natural justice (*physikon dikaion*) and conventional justice (*nomikon dikaion*), with material prevalence for the former[5]. Then, during the medieval phase, Abelardo, Saint Augustine and Saint Thomas Aquinas dealt with the legal criteria established by divinity (*lex divina*), which should prevail in the case of flagrant injustice in the application of human laws[6].

Later, the paradigm of Legal Positivism became prevalent in academic and court scenarios, both in countries linked to the coded tradition (civil law or code based legal systems), and in those using the case law model (common law or judge made law systems), focusing on safety regarding the definition of legal rules. The main concern came to lie in producing legal rules liable to foreseeable application, increasing the certainty necessary for harmony of social relations, mainly to preserve market expectations.

With this view, Hans Kelsen maintained that positive law could have any content, due to their releasing from the parameters of political morality, although they had influenced lawmakers and judges[7]. Likewise, Herbert L. A. Hart stated that the concept of law refers to order with the

[3] PASOLD, César. **Metodologia da pesquisa jurídica**: teoria e prática. 14 ed. São Paulo: Conceito, 2018.

[4] FARALLI, Carla. **Le grandi correnti della filosofia del diritto**: dai greci ad Hart. Torino: G. Gappichelli, 2011. p. 09-41.

[5] ARISTÓTELES. **Ética a Nicômaco**. 3 ed. São Paulo: Edipro, 2009. p. 163-164. Ainda FRIEDE, Reis. **Teoria do pensamento jurídico**: jusnaturalismo e juspositivismo. Curitiba: Appris, 2018. p. 41.

[6] FRIEDE, Reis. **Teoria do pensamento jurídico**: jusnaturalismo e juspositivismo. Curitiba: Appris, 2018. p. 37 e 39-40. Ainda MORRIS, Clarence. **Os grandes filósofos do direito**. São Paulo: Martins Fontes, 2002. p. 53-70. Também REALE, Giovanni. ANTISERI, Dario. **História da filosofia**: Patrística e Escolástica. V. 2. 4 ed. São Paulo: Paulus, 2011. p. 227-230.

[7] KELSEN, Hans. **Teoria pura do direito**. 7 ed. São Paulo: Martins Fontes, 2006. p. 78. Ainda KELSEN, Hans. **Teoria geral das normas**. Porto Alegre: Sergio Antonio Fabris, 1986. p. 145-156.

core composed only of primary and secondary legal rules, in which values are displaced to the edge[8].

The doctrine records several concepts of law, liable to fitting between these two positions, either concerned with the prevalence of quality (natural law), or directed to the predominance of legal safety (positive law). In quantitative terms, it should be mentioned that in the work of Dimitri Dimoulis it is possible to discern a report of at least eighteen different legal concepts, employed by lawyers of notable historical expression[9].

More recently, however, the current post-positivists have proposed a balance between quality and safety in the activity of originating laws, so as to recommend a concept of law which handles, to a certain extent, both the aforesaid aspects.

Among the post-positive authors, the proposal of Robert Alexy has had a large effect. He edited a specific work about the subject, in which he conceptualized law as a system of standards which, jointly, are formulated aiming at axiological correction, have overall social efficacy (or at least have the possibility of general effects), are not extremely unfair and are adapted to the parameters of a presupposed essential standard, of which the application can rest upon principles or other normative arguments[10].

This concept, as can be perceived, on one hand, covers the positive law of a set of pre-established and so foreseeable standards, as well as, on the other hand, adds parameters of material justiciability, handling the intention of moral correction and denying the validity of extremely unfair standards.

For the purposes of this article, it is necessary to assert a semantic agreement about the concept of law, with a view to enable later discussion. Furthermore, regarding the current trends of connecting aspects of quality (justice) and foreseeability (legal safety) as essential marks of the phenomenon, one opts for the concept of aggregation.

Bearing this directive in mind, law can be understood to be the set of standards artificially created to rule the undertaking of decision-making with impact in society, constructed focusing on safety and quality, so as to enable harmonious coexistence.

Concerning the aspect of safety, the parameters seek to be as objective and clear as possible, so as to facilitate prior knowledge about the directives in force in a determined community. Safety, moreover, is intrinsically linked to the effort of furthering higher degrees of

[8] HART, H. L. A. **O conceito de direito**. São Paulo: Martins Fontes, 2009. p. 128

[9] DIMOULIS, Dimitri. **Introdução ao estudo do direito**. 4 ed. São Paulo: RT, 2011. p. 23-25.

[10] ALEXY, Robert. **Conceito e validade do direito**. São Paulo: Martins Fontes, 2009. p. 151: "O direito é um sistema normativo que (1) formula uma pretensão à correção, (2) consiste na totalidade das normas que integram uma constituição socialmente eficaz em termos globais e que não são extremamente injustas, bem como na totalidade das normas estabelecidas em conformidade com essa constituição e que apresentam um mínimo de eficácia social ou de possibilidade de eficácia e não são extremamente injustas, e (3) ao qual pertencem os princípios e outros argumentos normativos, nos quais se apoia e/ou deve se apoiar o procedimento de aplicação do direito para satisfazer a pretensão à correção".

certainty and foreseeability in determining conduct, although absolute determination is unattainable, as invariably a certain measure of doubt or room for maneuver remains[11].

On the other hand, from the perspective of quality, a set of parameters of resolution adapted to the prevailing worldview in a certain community is sought, which undergoes great influence of political morality and, furthermore, can be represented by widely variable dictates of justice, particularly in a cosmopolitan, changeable and heterogeneous scenario. Thus, from this point of view, there is great variation for analysis of the adaptation and correction of the parameters adopted, depending upon the way of thinking in force, i.e., according to the perspective of the interpreter.

It should be added that it does not suffice to view law as a pre-established collection of judgment criteria, i.e., as a construction totally ready, which simply needs to be accessed to enable the confirmation of the correctness (lawfulness) or incorrectness (unlawfulness) of a certain decision taken in society. It does not only refer to something already given in the past in a sufficient way to rule the whole future. This is because it is necessary to join this perspective to the notion of a human activity in constant development in the social scenario, i.e., it also concerns an undertaking in attainment. Furthermore, uniting the two approaches, it is possible to state that law is a set of parameters related to the political undertaking of decision-making. From the point of view of the one who decides (a judge, for example), the legal system provides aid aiming to determine his/her task of resolving a particular case by argument[12].

Precisely in this perspective, Ronald Dworkin recommends conceiving law from a dual perspective, in the sense of regarding the set of criteria established in the past (backward looking), complemented by the objective of constructing the appropriate response for the future (forward looking), in an integrated away[13].

Having established this semantic agreement concerning the concept of law, it is necessary to proceed with the definition of science.

2. A CONCEPT OF SCIENCE

The scope of this second item consists of discussing, briefly and succinctly, the history of philosophy to justify the adoption of a contemporary concept of science.

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[11] NUNES, Marcelo Guedes. **Jurimetria**: como a estatística pode reinventar o direito. São Paulo: RT, 2016. p. 84: "Consistência e previsibilidade sempre foram ideais do Direito, expressos, inclusive, nos princípios da segurança jurídica e da isonomia. [...] No entanto, por maiores que tenham sido os esforços teóricos e práticos para sistematizar a ordem jurídica, as incertezas do Direito nunca foram extirpadas". E na p. 83: "A promulgação de leis para orientar os juízes tem origem na preocupação em dar previsibilidade às decisões judiciais, reduzindo a arbitrariedade e a inconsistência resultantes das diferentes opiniões dos magistrados".

[12] ATIENZA, Manuel. **O direito como argumentação**. Lisboa: Escolar, 2014. p. 80: "O Direito pode conceber-se como um empreendimento dirigido à resolução (ou tratamento) de certo tipo de problemas mediante a tomada de decisões por meios argumentativos. Se a argumentação é tão essencial no Direito (nos nossos Direitos), é porque o estamos a considerar como um mecanismo muito complexo de tomada de decisões (por parte dos legisladores, dos juízes, dos advogados, dos juristas ao serviço da administração, dos dogmáticos do Direito ou inclusive dos simples cidadãos que vivem integrados num sistema jurídico) e dos raciocínios que acompanham essas decisões".

[13] DWORKIN, Ronald. **O império do direito**. São Paulo: Martins Fontes, 2007, p. 112-331.

Concerning the issue, initially, it should be pointed out that the concepts of philosophy and science were considered to be interchangeable until, approximately, the historical moment of the Scientific Revolution, included between the edition of the central work of Nicolaus Copernicus (*De Revolutionibus Orbium Coelestium*), in 1543, and the first publication of the main text of Isaac Newton (*Philosophiae Naturalis Principia Mathematica*), in 1687[14].

As of this historic phase, the epistemology[15] came to be dedicated to establishing a criterion which could separate both the focuses, reserving for science the studies concerned with producing knowledge qualified by a relevant aspect, such as, for example, the correspondence with facts, the exclusion of metaphysical issues or the widest theoretical acceptance between the community of scientists, depending upon the point of view adopted.

For the purposes of this work, it is reasonable to start the short historical trail referring to the so-called neo-positive movement, formulated in the Vienna circle (*Wiener Kreis*), which remained active mainly between the years 1924 and 1935. The aim of this group was to build a general theory for all sciences, including the social ones, using the same logical and mathematical language employed in the field of the exact ones, of which the central focuses lie on the principle of empirical checking and anti-metaphysical force[16].

For these thinkers, the principle of checking (or checkability) establishes the criterion to separate metaphysical discussion, which does not make sense, from contents qualified as scientific, characterized by the feasibility of undergoing empirical experimentation[17].

The first version of the principle of checkability, developed by Rudolf Carnap, established that the truth is reflected in the facts, according to a criterion of correspondence. In other terms, a scientific proposition is considered to be true while it corresponds to a factual observation. A word has the function of indicating a reality existing beyond language[18].

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[14] REALE, Giovanni. ANTISERI, Dario. **História da filosofia**: Do Humanismo a Descartes. V. 3. São Paulo: Paulus, 2004. p. 141.

[15] ABBAGNANO, Nicola. **Dicionário de filosofia**. 6 ed. São Paulo: Martins Fontes, 2012. p. 392: "Termo de origem grega que apresenta duas acepções de fundo. Num primeiro sentido (como o inglês Epistemology), é sinônimo de gnosiologia ou de teoria do conhecimento. Num segundo sentido, é sinônimo de filosofia da ciência. Os dois significados estão estreitamente interligados, pois o problema do conhecimento, na filosofia moderna e contemporânea, entrelaça-se (e às vezes se confunde) com o da ciência".

[16] ABBAGNANO, Nicola. **Dicionário de filosofia**. 6 ed. São Paulo: Martins Fontes, 2012. p. 167.

[17] WAAL, Cornelis. **Sobre pragmatismo**. São Paulo: Loyola, 2007. p. 197: "Em suma, para os positivistas lógicos, o significado de uma proposição é seu método de verificação. Essa visão é conhecida como verificacionismo, e o critério de significado dos positivistas lógicos é chamado de princípio da verificabilidade ou o princípio de verificação. [...] Os positivistas lógicos primeiro mantinham uma versão forte do princípio segundo a qual uma afirmação é significativa se e somente se é possível mostrar conclusivamente sua verdade ou falsidade relacionando-a a experiências sensíveis. [...] Versões mais tardias do princípio de verificação afrouxaram a exigência de que para uma afirmação ser significativa devemos ser capazes de demonstrar conclusivamente que ela é verdadeira ou falsa". E REALE, Giovanni. ANTISERI, Dario. **História da filosofia**: de Freud à atualidade. V. 7. São Paulo: Paulus, 2006. p. 119: "O princípio da verificação é um princípio tornado próprio pelos neopositivistas do Círculo de Viena para separar as asseções sensatas das ciências empíricas das asserções insensatas das várias metafísicas ou também das fés religiosas. [...] Isso equivale a dizer que têm sentido unicamente as proposições que podem ser factualmente verificadas; por conseguinte, as proposições que não podem ser verificadas são privadas de sentido. É oportuno observar aqui que dizer de uma proposição que ela é privada de sentido não significa afirmar que ela é falsa, mas exatamente que é privada de sentido".

[18] REALE, Giovanni. ANTISERI, Dario. **História da filosofia**: de Freud à atualidade. V. 7. São Paulo: Paulus, 2006. p. 118: "Carnap é extremamente claro: fora das expressões de lógica e matemática, que são apenas transformações tautológicas, não há fonte de

This original modulation found it is difficult to justify the relationship between propositions and facts, regarding the subjectivity of the interpreter in establishing the projective representation of the theses on the facts[19]. Aiming at overcoming this criticism, Otto Neurath, strongly inspired by the first phase of the work of Ludwig Wittgenstein, replaced the criterion of the factual correspondence, referred to previously, by that of coherence between propositions. To do so, it was assumed from the start that language itself deserves to be considered to be a physical fact in its own right. It concerns the proposition of physicalism, in which the signals and sounds of language are, in themselves, considered to be physical facts liable to empirical observation. From this point of view, the principle of checking is modified to accept as logical and rational the propositions which, articulated with the network of theses in force, present acceptability and internal coherence[20].

The criticism related to the principle of checkability, in the two aforementioned versions, were driven mainly by the work of Karl Popper. In accordance with him, the most appropriate criterion to establish the frontiers of knowledge described as scientific consists of postulating empirical falsifiability.

According to the criterion of falsifiability, a determined theoretical proposition is only scientific if it can be shown to be false through empirical experiments. Moreover, the arguments not liable to factual experimentation are not scientific, being able to be metaphysical when rational (and censurable) or, then, mythological, religious or simple common sense. As can be perceived, instead of separating that which makes sense (empirical science) from that which does not (metaphysical), the new parameter presents a limitation allegedly clear between empirical scientific and other knowledge[21].

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conhecimento além da experiência: não existe nenhum juízo sintético a priori, nenhuma intuição, nenhuma visão eidética. As palavras só têm significação quando indicam algo factual, e as afirmações só têm sentido quando expressam um possível estado de coisas; do contrário, no primeiro caso, temos um Scheinbegriff (pseudoconceito) e no segundo uma Scheinsatz (pseudoproposição)".

[19] SHOOK, John Robert. **Os pioneiros do pragmatismo americano**. Rio de Janeiro: DP&A, 2002. p. 35: "O solipsismo alega que a realidade se resume ao mundo interno de ideias que existem em minha própria mente".

[20] REALE, Giovanni. ANTISERI, Dario. **História da filosofia**: de Freud à atualidade. V. 7. São Paulo: Paulus, 2006. p. 118-119: "A adoção da linguagem como fato físico e a eliminação de sua função de representação projetiva dos fatos levam a uma mudança radical no critério de aceitabilidade. A teoria da verdade como correspondência entre uma proposição e um fato é substituída pela teoria da verdade como coerência entre proposições. Uma proposição, portanto, é 'não-correta' se não se harmoniza com as outras proposições reconhecidas e aceitas no corpus das ciências, caso contrário é 'correta'. Esse é o único critério com o qual se pode projetar uma enciclopédia da ciência unificada, utilizando uma única linguagem sensata, a das ciências físicas".

[21] POPPER, Karl R. **A lógica da pesquisa científica**. 9 ed. São Paulo: Cultrix, 2008. p. 41-44, notadamente p. 42: "Contudo, só reconhecerei um sistema como empírico ou científico se ele for passível de comprovação pela experiência. Essas considerações sugerem que deve ser tomado como critério de demarcação não a verificabilidade, mas a falseabilidade de um sistema. Em outras palavras, não exigirei que um sistema científico seja suscetível de ser dado como válido de uma vez por todas, em sentido positivo; exigirei, porém, que sua forma lógica seja tal que se torne possível validá-lo através de recurso a provas empíricas, em sentido negativo: deve ser possível refutar, pela experiência, um sistema científico empírico". Também POPPER, Karl R. **Conjecturas e refutações**. 5 ed. Brasília: UnB, 2008. p. 223: "Há cerca de vinte e cinco anos propus que se distinguisse as teorias empíricas ou científicas das teorias não-empíricas e não-científicas, definindo as primeiras como refutáveis e as segundas como irrefutáveis. As razões da minha propostas eram as seguintes: todo teste a que submetemos uma teoria é uma tentativa de refutá-la. 'Testabilidade', por conseguinte, é o mesmo que refutabilidade (falsifiability). Como chamamos de 'empíricas' ou 'científicas' só as teorias que podem ser testadas empiricamente, concluímos que é a possibilidade de refutação empírica que distingue as teorias científicas (ou empíricas)".

In accordance with this parameter of scientific theories, research is not guided by observing facts to, through the exercise of induction, formulate general laws. Indeed, scientific research starts when a problem or query arises and, then, the scientist develops a series of theories (conjectures) to offer accurate descriptions and useful prescriptions to resolve them, liable to factual experimentation, which are valid until possible denied by new theoretical formulations. Furthermore, regardless of the number of factual confirmations of a theoretical proposition, a single falsification suffices to show its invalidity and, then, inaugurate new efforts of overcoming. Science operates by deduction, in the conjectural framework of a theory, until it is possibly denied. In this line of thought, the path of science starts with problems, passes by creative effort of theoretical construction and proceeds with attempts of refutation[22].

Another logical consequence of this line of reasoning consists of allowing the relevance of philosophical and metaphysical studies, for two central reasons. First, because argumentative creativity tends to aid in constructing conjectures to respond to various problems and, moreover, not rarely offers hypotheses and alternatives to scientists which, later, end up being converted into scientific knowledge. And, secondly, because there are several fields of research which are highly relevant to human existence, although not liable to factual experimentation, for example questions of an ethical nature[23].

From this new criterion, a set of thinkers came to deepen studies about the historical development of sciences, i.e., more precisely, how the community of specialists effectively produces scientific knowledge, in order to present its basic features. Based upon the criticism of Popper, there was a rupture with the postulates of positivism and neo-positivism, so as to justify venturing the denomination of a post-positivist model (or post-popperian model) for scientific knowledge.

This set of post-positivist authors has as central characteristic the highlight awarded to the descriptive aspect of producing knowledge, instead of the formulation of supposed abstract and universal criteria of delimitation of what makes sense (such as the neopositivist checkability).

E ainda REALE, Giovanni. ANTISERI, Dario. **História da filosofia**: de Freud à atualidade. V. 7. São Paulo: Paulus, 2006. p. 145-146: "Por aí se pode ver que, para ser provada de fato, uma teoria deve ser provável ou verificável em princípio. Em outras palavras, deve ser falsificável, ou seja, deve ser tal que dela sejam extraíveis consequências que possam ser refutadas, isto é, falsificadas pelos fatos. Com efeito, se não for possível extrair de uma teoria consequências passíveis de verificação factual, então ela não é científica. Entretanto, deve-se observar que uma hipótese metafísica de hoje pode se tornar científica amanhã (como foi o caso da antiga teoria atomista, metafísica nos tempos de Demócrito e científica na época de Fermi). [...] É com base nessa assimetria [entre verificação e falsificação] que Popper fixa a ordem metodológica da falsificação; como uma teoria permanece sempre desmentível, por mais confirmada que esteja, então é necessário tentar falsifica-la, porque, quanto antes se encontrar um erro, mais cedo podereremos eliminá-lo, com a formulação e a experimentação de uma teoria melhor do que a anterior. Desse modo, a epistemologia de Popper reflete a força do erro".

[22] REALE, Giovanni. ANTISERI, Dario. **História da filosofia**: de Freud à atualidade. V. 7. São Paulo: Paulus, 2006. p. 144-145.

[23] POPPER, Karl R. **Conjecturas e refutações**. 5 ed. Brasília: UnB, 2008. p. 285: "Já indiquei uma das razões para isso ao afirmar que não devemos procurar traçar uma linha de demarcação [entre ciência empírica e metafísica] com muita nitidez, o que se tornará claro se lembrarmos que a maior parte das teorias científicas tiveram sua origem em mitos". Ainda REALE, Giovanni. ANTISERI, Dario. **História da filosofia**: de Freud à atualidade. V. 7. São Paulo: Paulus, 2006. p. 146-149.

In a very brief mention of some of the most notable names of this movement, it should be pointed out that Gaston Bachelard proposed that knowledge approaches truth through successive epistemological ruptures (*coupure*), for example how the theory of relativity of Einstein represented a break (and an advance) with the absolute concepts of space and time previously developed by Newton[24].

Imre Lakatos, in turn, asserted that science is characterized by competition between research programs which compete for hegemony in a determined field of investigation[25].

Larry Laudan, on the other hand, argued that scientific theories are constructions concerned with resolving problems in a determined research tradition, the one which attains the greatest degree of decisive success tending to predominate[26].

According to the post-positivist methodological line concerned, the structure of the scientific revolutions presented by Thomas Kuhn, which obtained considerable effect among students of epistemology, should be mentioned.

As stated by this author, scientific theories are developed in accordance with a determined paradigm base, predominant among specialists of the area, which defines the outlines of research at each historical moment. While this disciplinary matrix is appropriate and sufficient for resolving the problems presented, it tends to remain apparent, until contrasted with an insoluble issue, which prevents proceeding with the research. To overcome this barrier, the model in force is contrasted with other theoretical propositions, usually prepared by thinkers new to that field of knowledge. The thesis which manages to overcome the paradigm will represent a theoretical leap (a paradigm shift) in the respective area and, thus, will tend to rule the respective discussion, until a new anomaly occurs[27].

According to this epistemological proposition, development through bounds between theoretical models reveals that, first, it is not possible to measure the validity of a theory in accordance with its precise representativeness in the world of facts, although it is a trend to deny

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[24] REALE, Giovanni. ANTISERI, Dario. **História da filosofia**: de Freud à atualidade. V. 7. São Paulo: Paulus, 2006. p. 125-130.

[25] REALE, Giovanni. ANTISERI, Dario. **História da filosofia**: de Freud à atualidade. V. 7. São Paulo: Paulus, 2006. p. 166-167: "E [o falsificacionismo ingênuo] é insatisfatório porque concebe o desenvolvimento da ciência como uma série de duelos sucessivos entre uma teoria e os fatos, ao passo que, para Lakatos, as coisas não se realizam desse modo, porque a luta entre o teórico e o factual sempre ocorre pelo menos entre três partes: entre duas teorias em competição e os fatos. Tudo isso explicaria o fato de que uma teoria não é descartada quando algum fato a contradiz, mas somente quando a comunidade científica tem à disposição uma teoria melhor do que a anterior: assim, por exemplo, a mecânica de Newton só foi rejeitada depois que se passou a contar com a teoria de Einstein".

[26] REALE, Giovanni. ANTISERI, Dario. **História da filosofia**: de Freud à atualidade. V. 7. São Paulo: Paulus, 2006. p. 170-171, dali cabendo destacar a noção de progresso científico, referindo que "os pontos básicos do modelo de desenvolvimento da ciência proposto por Laudan são bastante simples: 1) o problema resolvido, empírico ou conceitual, é a unidade de base do progresso científico; 2) o objetivo da ciência é o de maximizar a dimensão dos problemas empíricos resolvidos, e reduzir a dimensão dos problemas empíricos anômalos e dos problemas conceituais não resolvidos."; bem como destacar a ideia de que "uma tradição de pesquisa fornece um conjunto de diretrizes para a construção de teorias específicas" e ainda que "Portanto, uma tradição de pesquisa consiste de uma ontologia que especifica os objetos do domínio da investigação e de uma metodologia que indica como proceder na pesquisa. E violar a ontologia e/ou metodologia de uma tradição de pesquisa significa colocar-se fora dela e repudiá-la".

[27] KUHN, Thomas S. **A estrutura das revoluções científicas**. São Paulo: Perspectiva, 2009. p. 9-17.

the propositions which rationally do not correspond to the statistical description of reality; secondly, the validity (or even the truth) of a scientific theory is usually measured by the degree of adhesion among the scientific community; and, thirdly, the acceptance of a theoretical proposition is related to its utility for pragmatically resolving problems in its specific field.

The proposal of Kuhn was criticized, particularly by those who prefer an interpretation based more truly on the models of empirical falsifiability (according to Popper, as referred to above) or of calculability of probabilities in scientific inference (for example, the theorem of Thomas Bayes), or also of a conjunction between the two. However, the generality of the criticism is not concerned with incoherence in the historical factual description, but with the supposed incompleteness of the theory, which could also describe the means whereby a theoretical proposal is overcome by another one, particularly with more precise mathematical formulas.

Thus, it could be safely stated that the proposal concerned represents a plausible description of the historical evolution of thought in several fields, including regarding legal theories.

Therefore, for the purposes of this study, a concept of science is proposed based on the post-positivist (or post-popperian) field referred to above, as a cognitive, explicative and predictive activity, executed based upon rational methodology (methods and techniques), for purposes of systematizing, transmitting, controlling, reviewing and checking safety in the production of knowledge, within the areas of the respective paradigms[28].

3. CONCERNING THE IMPORTANCE OF A LEGAL SCIENCE

Having established the concepts of law (item 1) and science (item 2), it remains possible to discuss the possibility, or not, of the production of knowledge described as scientific about legal issues.

Having reached the crucial point of this text, it is appropriate to present arguments on behalf of the feasibility of producing legal theories fitting the concept of the aforementioned post-positivist science. Alternatively, it is important to at least present justification for an effort to produce knowledge about legal issues with technical basis, particularly through methodology similar to the other sciences, so as to escape the exclusiveness of employing metaphysical argumentation.

Continuing such aspiration, it is important to note that science develops not only through applying methods to check the correspondence of certain assertions with the facts, but also through the development of abstract theories, which establish justified relations between the description of phenomena and the normative guidelines for them (precisely the paradigms). This is because, “in spite of using empirical research as a means of investigation, the end goal of science

[28] ZANON JUNIOR, Orlando Luiz. **Teoria complexa do direito**. 3 ed. São Paulo: Tirant lo Blanch, 2019. p. 42.

is to formulate and test theories about the world", furthermore, it remains "impossible to practice science without making use of abstract ideas"[29].

In the post-positivist perspective of epistemology presented at the end of the previous item, it would not be bold to state that a researcher dedicated to legal studies is as much of a scientist as a theoretical physicist or an experimental chemist, as (s)he equally works in constructing arguments (also supported by mathematical formulas) capable of sustaining certain transitory truths (paradigms). Even when a scientist concerned with morality and legality is seeking to justify the establishment of certain standards of conduct, without being able to establish absolute correspondence between what is and what ought to be, his/her activity is considered to be scientific, because it is based on methods which seek to enable arguments on behalf of an agreement in the heart of the scientific community, so as to articulate even further the disciplinary model in force or present rational alternatives for overcoming, totally or at a certain point[30].

However, the positioning is recorded of thinkers who deny the quality of science (i.e., the status of science) in legal studies. The most criticism is that empirical study is not feasible concerning political material artificially created by man, besides other similar considerations, appearing in the introduction.

Despite this criticism, it is not advisable to conduct legal studies as a type of metaphysics, understanding this as mere abstract rational speculation on essential assumptions, which cannot undergo some method of factual confirmation, i.e., they lack empirical support[31].

This is because the activity of collective decision-making in society can be investigated with instruments related to factual expression, notably statistics, economics, psychology and sociology, etc. In this line of thought, it does not only deal with a philosophy concerned with a metaphysical field, but a science which employs specific methodology to investigate the causes and effects of the activity of creating standards of behavior and their respective impact on undertaking decision-making in human collectivity. Furthermore, abstract rational discussion is left behind, adding the employment of methods and techniques to check factual data, which are sufficient to raise the legal studies to the status of scientific.

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[29] NUNES, Marcelo Guedes. **Jurimetria**: como a estatística pode reinventar o direito. São Paulo: RT, 2016. p. 100.

[30] HABERMAS, Jürgen. **Direito e democracia:** entre facticidade e validade. V 1. Rio de Janeiro: Tempo Brasileiro, 2003. p. 281: "A correção de juízos normativos não pode ser explicada no sentido de uma teoria da verdade como correspondência, pois direitos são uma construção social que não pode ser hipostasiada em fatos. 'Correção' significa aceitabilidade racional, apoiada em argumentos. Certamente a validade de um juízo é definida a partir do preenchimento das condições de validade. No entanto, para saber se estão preenchidas, não basta lançar mão de evidências empíricas diretas ou de fatos dados numa visão ideal: isso só é possível através do discurso – ou seja, do caminho de uma fundamentação que se desenrola argumentativamente". DWORKIN, Ronald. **O império do direito**. São Paulo: Martins Fontes, 2007. p. 17: "O direito é, sem dúvida, um fenômeno social. Mas sua complexidade, função e consequências dependem de uma característica especial de sua estrutura. Ao contrário de muitos outros fenômenos sociais, a prática do direito é argumentativa. Todos os envolvidos nessa prática compreendem que aquilo que ela permite ou exige depende da verdade de certas proposições que só adquirem sentido através e no âmbito dela mesma; a prática consiste, em grande parte, em mobilizar e discutir essas proposições".

[31] ABBAGNANO, Nicola. **Dicionário de filosofia**. 6 ed. São Paulo: Martins Fontes, 2012. p. 766-776.

The argument should be added that it is highly advisable to suggest an effort of seriousness and coherence in developing scientific research in this specific area, so that lawyers go beyond superficial discussion based upon entrenched slogans, lacking factual basis, to seek the empirical justification of their theses, as well as through using tools usually employed by economists, psychologists, sociologists and other researchers. Currently, on one hand "the fraction invested in the formulation and preparation of abstract normative theories is too large", while, on the other hand, "that which goes to the development and application of scientific social theories and to the collection of data about the real operation of the legal system, its costs and other consequences is too small"[32].

Just because of this bias, the area called jurimetrics has been emphasized to highlights the importance of statistical indicators in legal studies, particularly because "the touchstone of this process is to make law return to being a social science, a science concerned about man and not a branch of literature which interprets abstract legal standards"[33].

Indeed, one should bear in mind the lesson of Bertrand Russel that a theoretical construction lacking an empirical basis can be represented as an inverted pyramid, in which the essential principle lies in its sustaining point and, thus, if undone, it entails the collapse of all the articulation[34].

This importance granted to the data taken from concrete reality, through statistical, sociological, economic and psychological research, etc., aims to grant further information for undertaking decision-making, which characterizes the focus of legal studies. However, this does not mean the complete forsaking of an approach of a political nature regarding the axiological evaluation of the decisive options available. As is well-known, despite the knowledge about reality provides information for resolution, nevertheless, the data reading deserves to be complemented by a qualitative analysis.

In other words, metric analyses provide data for a more informed decision related to the causes and their effects, however, law includes axiological issues for human directives among its elements. Notably, "Science can tell you how to achieve certain ends better. What it cannot tell you is that you should pursue this end instead of that other one", so that "a consequence of this

[32] POSNER, Richard Allen. **A problemática da teoria moral e jurídica**. São Paulo: Martins Fontes, 2012. p. XVII.

[33] NUNES, Marcelo Guedes. **Jurimetria**: como a estatística pode reinventar o direito. São Paulo: RT, 2016. p. 179. Ver ainda p. 86: "Concluindo esta parte, posso até concordar que o ideal do conhecimento é a certeza. No entanto, a grande maioria das questões de nossa vida pessoal, profissional e acadêmica, especialmente aquelas envolvendo o direito, como a negociação de contratos ou a defesa em um processo, envolve diferentes graus de risco e incerteza. Consequentemente, somos obrigados a tomar decisões, munidos de informação insuficiente ou contraditória. Dentro desse mundo repleto de surpresas estocásticas, a estatística é o método de investigação capaz de controlar a incerteza, mensurar a probabilidade de sucesso dos argumentos e, com isso, nos auxiliar a tomar decisões com informações insuficientes e cercadas de dúvidas".

[34] RUSSELL, Bertrand Arthur William. **História do pensamento ocidental**. 21 ed. Rio de Janeiro: Nova Fronteira, 2017. p. 286: "O sistema [metafísico], a priori, embora consistente, desmoronará se os seus princípios básicos forem rejeitados. A filosofia empírica, por se basear em fatos observados, não desabará, ainda que descubramos eventuais defeitos. A diferença é a mesma que existe entre duas pirâmides, uma das quais foi construída de cabeça para baixo. A pirâmide empírica se apoia na base e não cai, ainda que se retire uma laje. A pirâmide a priori repousa sobre o vértice e tomba a um simples olhar".

fact is that we cannot justify scientifically the objectives which we pursue or the ethical principles that we adopt"[35].

Adding to the aforesaid, it is indicated that axiological vectors are the basic principles of the various legal systems, so as to reveal the importance of research concerning their factual impact on the respective society[36]. Studies of legal science must encompass political discussion regarding moral vectors, although the latter are not fully measurable numerically. No doubt, "law is not fully measurable. Only the concrete expression is measurable. Ideals, abstractions and values cannot be measured as they are devoid of extent and concreteness"[37].

It should be cautioned, however, that accepting the complement of qualitative analysis of statistical readings of reality does not have the power of removing the scientific nature of legal research. This is because the history of science has shown that all fields of knowledge, to a certain extent, incorporate a qualitative review of numerical analyses, as an indispensable complement to produce technical knowledge. So much is it so that, "on the attempts to find scientific replacements for those which they offensively call 'metaphysics', scientific philosophers often stumble in their own metaphysical difficulties", so that "although they were able to reject with a certain justice the metaphysical speculations of philosophers, they were inclined to forget that the scientific investigation itself is executed based upon certain assumptions"[38].

On the other hand, it is not in vain to stress that "empirical research does not want to reduce the axiological dimension of law to a handful of number, or even less wish to replace human decisions by mathematical models", but precisely the contrary, as "these forces are complementary, since the results of the investigation about the world as it is bring relevant information about what we must do to bring it close to what we should like it to be"[39].

Now, if on one hand "science is limited to understanding laws as statistical generalizations and not as necessary principles"[40], on the other hand, it should be noted that "it is a neutral tool of analysis of society as it is, always realistic and sometimes inconvenient, which can contribute to its improvement through an analysis of adaptation of means to given ends, but it does not have much to contribute to the choice of these ends"[41].

To sum up the aforesaid, one sought to gather together arguments on behalf of assigning scientific theories to legal studies, particularly because they deserve to be based on the search for

[35] RUSSELL, Bertrand Arthur William. **História do pensamento ocidental**. 21 ed. Rio de Janeiro: Nova Fronteira, 2017. p. 407-408.

[36] BARAK, Aharon. **The judge in a democracy**. Princeton: Princeton University Press, 2008. p. 57: "Fundamental principles (or values) fill the normative universe of a democracy. They justify legal rules. They are the reason for changing them. They are the spirit (voluntas) that encompasses the substance (verba). Every norm that is created in a democracy is created against the background of these values".

[37] NUNES, Marcelo Guedes. **Jurimetria**: como a estatística pode reinventar o direito. São Paulo: RT, 2016. p. 169.

[38] RUSSELL, Bertrand Arthur William. **História do pensamento ocidental**. 21 ed. Rio de Janeiro: Nova Fronteira, 2017. p. 376-377.

[39] NUNES, Marcelo Guedes. **Jurimetria**: como a estatística pode reinventar o direito. São Paulo: RT, 2016. p. 173.

[40] SHOOK, John Robert. **Os pioneiros do pragmatismo americano**. Rio de Janeiro: DP&A, 2002. p. 79.

[41] NUNES, Marcelo Guedes. **Jurimetria**: como a estatística pode reinventar o direito. São Paulo: RT, 2016. p. 53.

constructing knowledge supported by a certain statistical degree of factual confirmation, so as to allow paradigm articulation, as in the other areas of research. However, simultaneously, it is not ignored that concrete data examined scientifically can aid in identifying trends of human behavior according to formal normative encouragement provided, but is not sufficient to choose the axiological options of living together, so as to grant importance to a political complement inherent in the legal phenomenon.

CONCLUSIONS

The present chapter aims to present arguments to justify the importance of adopting a scientific approach to the study of legal phenomena.

The handling of the issue started by adopting a concept of law, aiming to delimit the scope of the discussion. At the end of the first item of the work, a semantic agreement was proposed in the sense that law can be understood to be a set of standards artificially created to rule the undertaking of decision-making with impact on society, built focusing on safety and quality, so as to enable living together harmoniously. Regarding the aspect of safety, it is sought that the parameters are as objective and clear as possible, so as to facilitate prior knowledge concerning the directives in force in a determined community. On the other hand, concerning the perspective of quality, a set of parameters is sought of appropriate resolution to the worldview prevailing in a determined community, which undergoes great influence of political morality and, moreover, can be represented by widely variable dictates of justice, particularly in a cosmopolitan, changeable and heterogeneous scenario.

In a second item, efforts were made to justify the option of a post-positivist (post-popperian) concept of science, based upon recent epistemological propositions, notably the structure of scientific revolutions proposed by Kuhn. The proposition states that science can be defined as a cognitive, explicative and predictive activity, executed based upon rational methodology (methods and techniques), for purposes of systematizing, transmitting, controlling, reviewing and checking safety in the production of knowledge, within the areas of the respective paradigms.

The third part of the text focused on the crucial point of the discussion, by presenting arguments on behalf of the feasibility of producing legal theories fitting the aforementioned post-positivist concept of science. Alternatively, arguments were made to at least present justification for an effort to produce knowledge about legal issues with technical basis, particularly through methodology similar to the other sciences, so as to escape the exclusiveness of employing metaphysical argumentation.

It was argued that the activity of regulating collective decision-making in society can be investigated with instruments related to factual expression, notably statistics, economics, psychology and sociology etc, aiming to go beyond abstract rational discussion through adding the use of methods and techniques to check factual data, which is sufficient to raise legal studies to the status of scientific.

It was mentioned, furthermore, that it is highly advisable to suggest an effort of seriousness and coherence in developing scientific research in this specific area, so that lawyers go beyond superficial discussion based upon entrenched slogans, lacking factual basis, to seek the empirical justification of their theses, as well as through using tools usually employed by economists, psychologists, sociologists and other researchers.

It was pointed out, however, that metric analysis provide data for a more informed decision related to the causes and their effects, but that law includes axiological issues for human directives among its elements. Notably, the axiological vectors are the basic principles of various legal systems, so as to reveal the importance of research on their factual impact on the respective society.

Due to the aforesaid, it is proposed that legal science is acknowledged as the field of scientific studies on the set of standards that rule the undertaking of making decisions with impact on society, which have the dual focus of safety and quality in furthering harmonious coexistence.

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THE COGNITIVE PROBLEM OF THE BEHAVIORAL DECISION THEORY THROUGH GAME THEORY: BIASES AND HEURISTICS

Alexandre Morais da Rosa[1]

INTRODUCTION

The challenge of the decision in the field of Law is an activity of all involved and there is not, *ex ante*, a mode of mandatory decision-making behavior. Based on the evidence and the normativity, whose meaning can vary, without being previously given, an accommodation in different plans will be necessary: a) normative; b) interactional-cognitive, and c) contextual. This is because decisions must take into account the normative apparatus, as well as the cognitive capacities of each of the players who participate in the procedural interaction, situated in time and space, that is, in a context[2]. With this preliminary assumption, it is possible to explore the possibilities of the judicial decision of the Brazilian legal universe, whose assumptions are constantly changing due to the importing of diverse thinking matrices, especially the American model[3]. At the same time, a path to new argumentative perspectives opens, taking into account that it is subject to cognitive traps, understood as systematic errors (biases) and/or mind shortcuts (heuristics).

In each decision, mind accounting is carried out without sufficient time or qualified information in sufficient quantity to decide in a perfect way, and in many situations there is no patience, willingness or attitude of the operators. Therefore, the decision-making process taught in Law school is naive and very simplified, not being realistic.

It is worth emphasizing, in the context of this chapter, what is being done and not what one says should be done, because the vast majority do not know how to say what needs to be done

[1] PhD in Law (Federal University of Paraná - UFPR), post-doctoral degree in Law (Faculty of Law of Coimbra and University of "Vale do Rio dos Sinos - UNISINOS). Master in Law (Federal University of Santa Catarina - UFSC). Associate Professor of Criminal Procedure at UFSC. Professor at the Undergraduate, Master's and Doctoral Programs at the University of Vale do Itajaí - UNIVALI. Judge of the TJSC (Tribunal of Justice of the State of Santa Catarina). Researcher of New Technologies, Big Data, Jurimetrics, Decision, Automation and Artificial Intelligence applied to the Judiciary, with transdisciplinary perspective. Coordinator of the Research Groups: Judiciary of the Future (CNPq), New Technologies, Big Data, Jurimetrics, Automation and Artificial Intelligence applied to Law (CNPq UNIVALI).

[2] The extended discussion, through the Game Theory applied to Law, was established in previous publications, among them the most recent: MORAIS DA ROSA, Alexandre. Guia do Processo Penal conforme a Teoria dos Jogos. Florianópolis: EMais, 2019. Therefore, I will use the term "player" as synonymous with "operator of law", including all those that interact in any decision context, provided with their own "mind map", singular rewards, indicated in the face of coordinates from the specified human interaction.

[3] ALLARD, Julie; GARAPON, Antoine. Os juízes na Mundialização: a nova revolução do Direito. Trad. Rogério Alves. Lisboa: Instituto Piaget, 2006; RAMIRES, Maurício. Diálogo judicial internacional: o uso da jurisprudência estrangeira pela justiça constitucional. Rio de Janeiro: Lumen Juris, 2016; HESPANHA, António Manuel. Cultura Jurídica Européia: síntese de um milênio. Florianópolis: Fundação Boiteux, 2005; DIMOULIS, Dimitri. O positivismo jurídico: introdução a uma teoria do direito e defesa do pragmatismo jurídico-político. São Paulo: Método, 2006; LOSANO. Mario G. Os Grandes Sistemas Jurídicos. São Paulo: Martins Fontes, 2007, p. 345: "O Common Law anglo-americano e o direito europeu continental, que agora regem a maioria da população mundial, tendem a se aproximar: o Common Law está passando por uma extensão dos statutes e das consolidations em detrimento do puro 'judge made law'".

because they simply do not know how to do it. In general “decide just by deciding”, using previous models, analogies, common places, in summary, in any way possible. So it does not matter how they say they decide, because it will be necessary to know how they decide in the face of each scenario by an external look, organized by the Game Theory. The chain of indicators needed for a decision varies widely, which is why we cannot be sure, since there are multiple combinations. However, some understandable steps can be taken, which improve predictability and behavioral expectations in the decision-making process. From these premises, it will be impossible to present a single model of understanding, which is why it will always be necessary to situate the context of the decision and its actors.

The inductive method was used for both the investigation phase and the research report phase. The procedural method used was the monographic and the research technique was the bibliographical one.

1. THE STANDARD DECISION MODEL DOES NOT EXPLAIN HOW DECISIONS ARE PRODUCED

Deciding is a human activity and it occurs all the time, especially in Law, considered a specific activity in which a third party (alone or collectively) deliberates on a controversy posed in a technical and contradictory way. In addition to the normative plan and the personal circumstances, it is constructed before the antecedent experience, shortcuts of decision, standards, beliefs about what “the better solution” is. It would be impossible to live without mind shortcuts, which are called “Heuristics”, and make life easier and can also lead to “Biases” (systematic errors) [4]. Therefore it will be necessary to open the field of law for new knowledge that point out the importance of the influence of new factors in the legal decision. In the juridical field there is an overlap of the way one decides, with influence of several variables, among them, emotional, intuitive, biological, etc. Thus, the standard model of mere subsumption is naive, since it does not sustain the complexity of the decision-making act. The cognitive trap is perfect because most lawyers say they act this way, though in most cases they do not have an adequate understanding of what is being done. This is because in the process of attribution of meaning all human factors - emotional, biological, cognitive, ideological, etc. - may apply.

The decision theories are so complex and anti-intuitive that only few take them seriously. The most interesting part is that theoretical common sense[5] establishes models incapable of demonstrating the application in practical cases that they operate. Decision theory needs to demonstrate its usefulness for solving concrete problems, in order to avoid causing

[4] KAHNEMAN, Daniel. Rápido e Devagar: duas formas de pensar. Trad. Cássio de Arantes Leite. Rio de Janeiro: Objetiva, 2012; KAHNEMAN, Daniel; FREDERICK, Shane. Representativeness Revisited: At- tribute Substitution in Intuitive Judgment. In: GILOVICH, Thomas; GRIFFIN, Dale; KAHNEMAN, Daniel (eds). Heuristics and Biases: The Psychology of Intuitive Ju- dgment. New York: Cambridge University Press, 2013, pp. 49-81; WOJCIECHOWSKI, Paola Bianchi; MORAIS DA ROSA, Alexandre. Vieses da Justiça: como as heurísticas e vieses operam nas decisões penais atuação contraintuitiva. Florianópolis: Emodara-EMais, 2018.

[5] WARAT, Luis Alberto. Introdução Geral ao Direito: a epistemologia jurídica da modernidade. Trad. José Luís Bolzan de Morais. Porto Alegre: Sergio Fabris, 1995, p. 15: jurists rely on a tangle of intellectual habits that are accepted as truths of principle to conceal the political component of the investigation of truths. Therefore certain images and beliefs can be canonized to preserve the secret that hides the truths. The world of jurists is a place of secrecy. The representations that integrate it pulverize our understanding of the fact that the history of legal truths is inseparable (so far) from the history of power.

frustration and discouragement to the actors who cannot verify its applicability. To do so, it must be intuitive and demonstrate the possibility of improving the daily life of the player/jurist. Involving operators presupposes engagement in something that makes sense and operates at the level of personal fulfillment (reward) of legal tasks. The quality of action feedback will be critical to the recognition of useful decision-making activity. It will be necessary, then, to understand how the jurists' attitudes and behaviors are decided, establishing a feasible operational framework.

Hence, the need to extend the coordinates of meaning to make the experience with the judicial decision more feasible and realistic, always looking for novelties that could broaden the realistic way in which the criminal decision can occur. The result is the establishment of practical indicators, conjugated with theoretical discussion, having as research field the behavioral economy, memory and brain functioning. This is because depending on how interaction occurs, on patterns of behavior and reasoning, the quality of the individual and collective results can be improved.

The models of decision-making prevailing in Law still operate with the logic of subsumption, that is, of the major premise, deduced from the law and the minor premise, arising from the facts found, which, through reasoning, could lead to a logical conclusion. Manuel Atienza[6], at the level of argumentation, describes and then criticizes the distinction between the context of discovery and justification, also accepted, among others, by Habermas[7], considered as arbitrary and legitimating the outcome of the decision and not its course. But also he underlines the importance of the auditoriums in which discourse is articulated[8]. In the case of the procedural game, the judges are the audience, whether they want it or not. Therefore, there is a topic dedicated on the subject of perception, heuristics and biases, with emphasis on aspects that can steal the scene (conscious and unconscious).

In any case, this model that fits the decision and the grounding makes room for what John Kay calls the "Franklin's gambit" in honor of the prominent Benjamin Franklin, according to whom: "So convenient a thing is it to be a reasonable creature, since it enables one to find or make a reason for everything one had a mind to do"[9]. This is because retrospective reading[10], after the conduct has been performed, provides traps of cognition and narratives (retrospective heuristics). The ability of players/judges to articulate the time, chronology, and sequence of information may yield mixed conclusions. But it is known in advance that explaining later is easier cognitively.

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[6] ATIENZA, Manuel. As razões do direito: teoria da argumentação jurídica. Tradução Maria Cristina Guimarães Cupertino. Rio de Janeiro: Forense Universitária, 2014.

[7] HABERMAS, Jürgen. Direito e Democracia: entre facticidade e validade. Trad. Flávio Siebeneicher. Rio de Janeiro: BTU, v. 1, 2010; BRITTO, Cláudia Aguiar Silva. Processo Penal Comunicativo: comunicação processual à luz da filosofia de Jürgen Habermas. Curitiba: Juruá, 2014; GÜNTER, Klaus. Teoria da argumentação no direito e na moral: justificação e aplicação. Trad. Claudio Molz. Rio de Janeiro: Forense, 2011.

[8] PERELMAN, Chaïm. Tratado de Argumentação. Trad. Maria Ermantina Galvão. São Paulo: Martins Fontes, 2002.

[9] KAY, John. A beleza da ação indireta. Trad. Adriana Ceschin Rieche. Rio de Janeiro: Beste Seller, 2011, p. 11.

[10] CASARA, Rubens R.R.. Interpretação Retrospectiva: sociedade brasileira e processo penal. Rio de Janeiro: Lumen Juris, 2004.

The retrospective bias gives the possibility of articulating a minimally coherent and consistent version of decisions (even when they are not). The problem is that the construction of the reasons is backwards, that is, from the present to the past, which authorizes that it can be justified (rhetorically or by manipulating premises and facts). What is done is not to narrate the decision process from the past to the present, but the reasons established after the event. This is called "retrospective bias". [11] The retrospective narrative, explored by legal argumentation, can generate effects of linearity and evident anticipation of results that, if inverted the order, would not be so clear. The retrospective bias in the criminal procedural game is powerful and as such gives the impression that one can more easily conceive cause and effect relationships, though the world is much more chaotic than can be articulated. There is a focus on several variables capable of constructing convincing argumentation or not, especially fallacies. The way an argument is constructed will make a difference in the cognitive map of the process.

The stance that treats theory as reality and reality as a mistake, not of theory, but its own, persecutes the jurist who finds himself/herself in the paradise of concepts. Linking one concept to another, in spite of facticity, many jurists shrug off the facts, tied to the world of paradises of the concepts that the Vienna Circle inspired[12]. The complexity of the world and the (im)possible reconstruction within the limits of the judicial process are taken by factual references devoid of facticity. The deontological forecasts, by which it is possible to prohibit, authorize or oblige conducts, although they serve as beacons, never anticipate the future. It would be wonderful if a prediction could be possible this way. But precisely because the world is more complex than legislative statements, the claim is imaginary. The problem is actually believing or pretending, more cynically, that it is possible to respond exclusively on the basis of norms. This position is not adopted in a fraudulent way by most jurists. It is part of their way of being. After all, the jurists were taught this way. And when one begins to question the way one thinks, oftenly, enters into despair or closes himself/herself off from what he/she believes. This dictum intends to dialogue precisely on the way in which one has been taught to find a juridical reason for everything, especially in the current "*pan-principialist*" universe, in which a principle (without being it, in most cases) ends up destroying a possible expectation of behavior of the interpreter.[13]

[11] MATLIN, Margaret W. Psicologia Cognitiva. Trad. Stella Machado. Rio de Janeiro: LTC, 2004, p. 286-287: in 1979, a man named Lawrence Singleton attacked a young woman who had asked him for a ride in California. He was sentenced to 14 years in prison, but he served eight years - he was released through an early termination of probation, for good behavior. Singleton then moved to his hometown in Florida where he lived quietly for about ten years. In 1997, he attacked another woman, who died due to multiple stab wounds. As one can imagine, people were outraged that the authorities in California had released Singleton before he served his time. However, it is worth noting that Singleton had been a model prisoner; according to the information the authorities had, they may have made the right decision. Pay attention to how a retrospective bias is applied here. While reading about Lawrence Singleton, weren´t you tempted to conclude that the authorities had been foolish and inconsequential for granting him early termination of probation? Maybe you overestimated their ability to predict that Singleton would hurt someone again.

[12] MORAIS DA ROSA, Alexandre. Decisão Penal: a bricolagem de significantes. Rio de Janeiro: Lumen Juris, 2006.

[13] STRECK, Lenio Luiz. Verdade e Consenso. São Paulo: Saraiva, 2012; FACCINI NETO, Orlando. Elementos de uma Teoria da Decisão Judicial: hermenêutica, Constituição e respostas corretas em Direito. Porto Alegre: Livraria do Advogado, 2011.

2. THE GAME THEORY AS THE FORMAL MATRIX OF DECISION

The process is a competition among diverse players with different rewards and the primary illusion is that if each one pursues his/her individual interests, the consequence of actions will be a better well-being (Adam Smith[14]). Thus, players end up looking for the best strategy without realizing that cooperation is a prime factor. They create duels, rivalries, unceasing struggles for conviction, without realizing something obvious portrayed by John Nash: collective well-being will be best when you do the best for yourself and the group.

Being the Process metaphorized by the Game Theory, it can be seen that the struggle for victory must come from the proper reading of the context of the game, in which the interaction depends on the rules recognized by the players, especially the magistrates (where the decision power of the controversy is applied), the possible rewards and tactics and strategies used. The formal resource provided by the Game Theory can be a powerful cognitive gain in expanding performance and reading errors and correctness. All this taking into account that the process operates with not always rational players and that the more one knows the way they think - the Mind Map, understood as the set of individual cognitive assumptions – the more one will be able to predict procedural behaviors and adjust tactics and strategies. Finally, these are tactical-strategic interactions between human beings located in time and space, with a dynamic character, that is, they can change at any time.

The Game Theory will serve as a metaphor for the process in which the probative letters (existing and possible to be produced) must be inventoried, strategically thought and know how to play, combining cognitive, argumentative and technical aspects. It presupposes the knowledge of the normative apparatus and its multiple possibilities of meaning. One should study not only the authors (doctrinators) and/or Courts that one likes, but especially those that one does not like, because it can be precisely this that the judge receives and it is him/her that you need to convince. One cannot convince someone with decision-making power without the ability to understand the respective arguments.

The challenge of the interaction resides in the possibility of elaborating a theory of the mind/brain[15] of the other players, that is, a theory and evidence of how others that interact with us think and behave. This becomes evident when we get to know the family, friends, children, since with the volume and quality of background information, it is possible to predict what they will do or how they will behave with a greater or lesser degree of rightness. Therefore, if it is possible to take seriously the people with whom one interacts, one should also know that "*I think He/She thinks that I think that He/She thinks"*, to infinity. Without this step towards cognitive interaction the process studied and taught remains in the normative field, of the jurists who slide in the imaginary of the single jurist, complete and coherent.

[14] SMITH, Adam. A riqueza das nações: investigação sobre sua natureza e suas causas. São Paulo: Abril Cultural, 1983.

[15] MORAIS DA ROSA, Alexandre; KALHED JR, Salah H.. In dubio pro Hell: profanando o sistema penal. Florianópolis: EMais, 2018, p. 85-98.

The most common cognitive trap is that one is capable enough to enter into the minds of other players and anticipate tactical actions, without due course and a certain amount of doubt. Mainly because he/she fails to recognize the assumption: players who interact do not think in general as we think they think and it is very common to think that the other player would think as "we want" him/her to think. This is a basic and very common error in the process environment reported by the Game Theory. Knowing that one can look for evidences and indicatives presupposes that there is a different element in the other. This fundamental (and radical) difference needs to be taken seriously, otherwise the fundamental role of human interaction will not be understood. Thus, knowing the other players, their heuristics and biases is a condition of possibility to predict minimally the dominant and expected behavior. But this does not guarantee absolute certainty and a dose for the unexpected must remain open.

The Game Theory makes it possible to establish dominant/neutral/dominated behaviors in the face of the possible actions of the other players who are interacting. If it is possible to anticipate what the tactics and strategy of the antagonist or even the judge will be, one gains in cognitive quality and is able to operate in accordance with the strategy with greater accuracy. Losses and mitigating risks are minimized and a course of action tending to be a winner is aligned.

In this way we must also know that one can be a victim of his/her own heuristics and biases, among them the overconfidence[16]. Therefore, it will be fundamental to accept the complexity and uncertainty of the huge chains and decision nodes that can, in one detail, change the entire strategic course. The proposed interaction will be among the players, with psychological and biological aspects that change within each decision context, taking into consideration the behavioral aspects.

The course is somewhat different because it does not matter, reaffirming, what jurists *say they do*, but rather the volatility with which they produce decisions, proposing a broader concept of rationality, in which apparent irrationality (emotions, anger, rancor, love, jealousy, etc.) can be understood and compose the decision matrix. Directly said: *the notion of modern reasoning cannot account for complexity.* Rationality is not ruled out, although without betting all chips on it, considering the Game Theory as the matrix of decision making[17].

Far from being a joke, the notion of game is used by a large philosophical, economic and law bibliography, among other fields, precisely in the sense that the Game Theory provides, as a situation contextualized in space and time in which rational agents - players - behave (or should behave) strategically. The operability of the games, in turn, overcomes *prejudice*, often Christian

[16] DAVIS, Morton David. Teoria dos Jogos: uma introdução não-técnica. Trad. Leonidas Hegenberg e Otanny Silveira da Mota. São Paulo: Cultrix, 1973, p. 74:. According to Davis, the story of each one - the success achieved so far in the game - influences the attitude towards risk.

[17] WALTON, Douglas N. Lógica Informal. Trad. Ana Lúcia R. Franco e Carlos A. L. Salum. São Paulo: Martins Fontes, 2012, p. 33. To Walton, it is necessary to recognize those critical points in which dialogue is no longer rational or moves away from a better line of argumentation.

(St. Thomas Aquinas considered game/gambling as a dangerous activity[18]), of having the game as something dirty and synonymous with a "prank", precisely because bets on people who understand interaction games as a serious facet of life in society[19]. Incidentally, Colas Duflo[20] demonstrates the use of the notion of game in authors like Thomas Aquinas, Pascal, Leibniz, Kant, Schiller, among others. Gadamer[21] even says that: "*The first evidence we need to take into account is that playing is an elementary function of one's life, at such a level that human culture, without an element of play, is unthinkable".* The modern erasure is that it can be redeemed at the moment. It is a formal bet of reading the structure of the game, always subject to the uncertainty of (ir)rational human interactions. The new point of view - from the Game Theory - causes a certain repulsion because it apparently breaks with the tradition of "seriousness" of work in the process field. The proposal is to take the human interaction seriously, without having something jocular, playful or even abusive.

The subject has already been approached, directly or indirectly, by several authors, including recently[22], emphasizing the classic text of Calamandrei[23], in which he had stated that memorizing the rules of chess does not make the subject a great chess player[24] as well as knowing the procedural rules does not enable him/her as a great procedural player, however, it is not

[18] RETONDAR, Jeferson José Moebus. Teoria do Jogo. Petrópolis: Vozes, 2007, p. 15-16. To Retondar, the game becomes a dangerous occupation for the Christian life, insofar as it can detract from the behavior of the individual due to its absorbing and engaging character. In this case, it is not only the game, but the excess that it can provoke is what becomes harmful from the point of view of Christian morality. The game, as one of the passions that occupy the soul, distorts the necessary attention and observance of the prudent man and of faith.

[19] DUFLO, Colas. O jogo: de Pascal a Schiller. Trad. Francisco Settineri e Patrícia Chittoni Ramos. Porto Alegre: Artmed, 1990; CAILLOIS, Roger. Los juegos y los hombres: la máscara y el vértigo. México: Fondo de Cultura Económica, 1986. It is important to highlight the typology presented by Caillois : (a) agon (competition - in which merit itself, in a regulated competition, will be the foundation of triumph - sports); (b) ilinx (the quest for vertigo - bets, lotteries, casinos, etc.), (c) mimicry (simulacrum - taste for an alien figure - theater, cinema, carnival and artist cult); and, (d) alea (luck - in which the passivity of waiting and the anxiety of fate prevail - mountaineering, skiing, extreme sports).

[20] DUFLO, Colas. O jogo: de Pascal a Schiller. Trad. Francisco Settineri e Patrícia Chittoni Ramos. Porto Alegre: Artmed, 1990.

[21] GADAMER, Hans_Georg. A atualidade do belo. A arte como jogo, símbolo e festa. Trad. Celeste Ainda Galeão. Rio de Janeiro: Tempo Brasileiro, 1985, p. 37.

[22] BAIRD, Douglas G.; GERTNER, Robert H.; PICKLER, Randal C. Game Theory and the Law. Cambrigde: Harvard University Press, 1994; ROBLES, Gregorio. As regras do direito e as regras dos jogos: ensaio sobre a teoria analítica do direito. Trad. Pollyana Mayer. São Paulo: Noeses, 2011; GIBBONS, R. Games theory. New Jersey: Princeton University, 1992; HEIDEGGER, Martin. Introdução à filosofia. Trad. Marco Antonio Casanova; revisão de tradução Eurides Avance de Souza; revisão técnica Tito Lívio Cruz Romão. São Paulo: Martins Fontes, 2008, p. 1-3; BINMORE, Ken. Teoría de Juegos: una breve introducción. Trad. José Ventura López. Madrid: Alianza, 2011; SIERRALTA RÍOS, Aníbal. Negociação e Teoria dos Jogos. Trad. Ricardo Serrano Osorio. São Paulo: RT, 2017; ABREU, Carlos Pinto de. Estratégia Processual: De uma visão bélica para uma perspectiva meramente processual. Coimbra: Almedina, 2014; PLETSCH, Natalie Ribeiro. Formação da Prova no Jogo Processual Penal. São Paulo: IBCCRIM, 2007; GONÇALVES, Jéssica. Acesso à Justiça e Teoria dos Jogos: da lógica competitiva do processo civil à estratégia cooperativa da mediação. Florianópolis: Empório do Direito, 2016; WINNICOTT, D. W. Realidad y Juego. Trad. Floreal Mazía. Barcelona: Gedisa, 2013; RUFIÁN LIZANA, Antonio. La búsqueda del equilibrio en la teoría de juegos. Madrid: RBA, 2017.

[23] CALAMANDREI, Piero. "O processo como jogo". Trad. Roberto Del Claro, Revista de direito processual civil. Curitiba: Gênesis, 2002, vol. 23, p. 192.

[24] This chapter is due to the dialogues with Laércio A. Becker. Becker, L. A. (2012). Qual é o jogo do processo? Porto Alegre: Sérgio Fabris. The metaphor of chess in game theory applied to the criminal process is insufficient because the game of chess is of full information, in the face of the pieces present on the board, without the past and the future, because it manifests itself in the present. It is also known that Dworkin criticizes the interpretative gap of the game of chess as a metaphor of law. See: DAVIS, Morton David. Teoria dos Jogos: uma introdução não-técnica. Trad. Leonidas Hegenberg e Otanny Silveira da Mota. São Paulo: Cultrix, 1973, p. 25-28; DWORKIN, Ronald. O Império do Direito. Trad. Jefferson Luiz Camargo. São Paulo: Martins Fontes, 1999; MACEDO JUNIOR, Ronaldo Porto. Do xadrez à cortesia. São Paulo: Saraiva, 2013; CATTONI DE OLIVEIRA, Marcelo Andrade. Direito Processual Constitucional. Belo Horizonte: Del Rey, 2001.

possible to play without knowing the rules. Understanding dogmatic critically is the assumption for anyone who wants to become a great player or judge. Robles[25], on the other hand, maintains that Law is comparable to the games since in both appear behaviors of cooperation, competition, fight and conflict, in which the result does not depend only on luck, but on the performance of the players in face of Jurisdiction and behavior of procedural agents.

The following expression is often used: *what is at stake*[26]. Then, without abusive academic puritanisms, of theories of low realistic factor, there is an aim to indicate "how" the process can work. This is because there are so many variables that the composition of a procedural scenario depends on a formal instrument capable of organizing the way the process is structured: the Game Theory. It is not enough to memorize the procedural rules because the process is an instrument of power in which the best players can make a difference. It is not a matter of merely applying/assembling legal rules to facts. The rules must be upheld by players who play fair, within *fair play*, although any of the players can always risk playing dirty to win. And this happens many times.

The ability to understand can provide the ability to anticipate illegal/illegitimate moves and create/invent coping tactics. If the procedural game is a human interaction regulated by the State that imposes the manner in which the decision can be applied, from characters (judges and parties), with functions of varied content - given the plurality of meanings and attitudes of each place due to the normative scheme -, the Game Theory, understood as an instrument for the formal analysis of conflicting interactions, can be used as a device for comprehension. The intended outcome of each player depends on the strategies and tactics chosen by each of the interaction agents. Therefore, to anticipate the point at which there is stability in the face of strategies, that is, the Nash equilibrium (not always desired or existing[27]), will be the challenge in every singular procedural game.

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[25] ROBLES, Gregorio. La Justicia en los juegos. Madrid: Trotta, 2010.

[26] BECKER, L.A. Qual é o jogo do processo? Porto Alegre: Sérgio Fabris, 2012.

[27] DAVIS, Morton David. Teoria dos Jogos: uma introdução não-técnica. Trad. Leonidas Hegenberg e Otanny Silveira da Mota. São Paulo: Cultrix, 1973, p. 117-118. According to Davis, he begins by presuming that two parties are negotiating a contract. For reasons of convenience and without loss of generality, Nash assumes that a failure in the understandings - no agreement is made, no sale - will have zero utility for both players. He then chooses a singular, arbitrated result, removing it from the set of agreements that the participants can reach, selecting the result in which the product of the players' profits is maximum. This scheme has four properties of great coexistence that, in Nash's point of view, justify its use and it is the only scheme to have such properties that are: 1. The arbitrated result must be independent of the utility function. Any arbitrated result must clearly depend on the preferences of the players and these preferences are expressed through a utility function. However, as we have seen previously, there are many utility functions to choose from. Since the choice of a utility function is entirely arbitrary, it becomes reasonable to require that the arbitrated result does not depend on the utility function chosen. 2. The arbitrated result must be Pareto optimality. Nash considered it desirable that the arbitrated result should be confused with the Pareto optimality, that is, there should be no other result in which both players simultaneously achieve more under such conditions. 3. The arbitrated result must be independent of irrelevant alternatives. Suppose there are two games A and B in which all the results of A are also results of B. If the arbitrated result of B is also a result of A, that result must be the same as that arbitrated in A. In other words, the result arbitrated in a game remains the arbitrated result, even when other results are eliminated as possible agreements. 4. In a symmetrical game, the arbitrated result has the same utility for both participants. Suppose that players in a negotiation game have symmetrical roles, that is, there is a result with utility x for one of the players and utility y for the other; in these circumstances, there must also be a result that has utility y for the first player and x for the second player. In such a game, the arbitrated result should be equally useful for both players.

There is a trajectory between the normative text and the meaning attributed by the players in each singular procedural context. The normative *design* of the abstract device present in the legislation may be far from the effective design, namely, the incident in that procedural interaction, hence the relevance in mapping players and knowing who will have the power to establish valid rules - hidden games. Although expectations of normative behavior exist, it can be recognized a "Babel of meanings"[28], whose anticipation can only be realistic if it is considered, in advance, the mind map (previous decisions, ways of operating and understanding, for example) and the rewards of real/effective players. It is considered as a player anyone who can exercise procedural powers in the procedural game: judge, parties, lawyers, witnesses, experts, media, etc. The plurality of competing meanings in the face of the same normative text implies acknowledging that there is no way of stating, surely, what attributes and meanings will appear at the peak of procedural interaction. The complexity of the variables that can modify the destinies of procedural games lacks, in general, a theoretical grid capable of sustaining the reading of possible and attributable meanings in each procedural context. The Game Theory emerges as an attempt to integrate a set of conceptual tools that authorize the reading of the real games not only by the normative character, but especially considering aspects linked to the creative performance of the players, influenced by individual rewards (democratic or not).

Playing in a situation of plurality of non-shared meanings, thus, demands a practical approach that uses a formal theoretical framework, organizer of the game design in two moments. In the first, the possible meanings are articulated in the face of abstract normativity, and in the second, the tendency of real players is anticipated in the face of multiple possibilities of behavior.

The theoretical framework of Game Theory will be formal and, as such, does not respond to how the process should be, precisely because it is linked to the becoming of a human interaction subject to the imponderable exercise of power. Although the pretension of the legal norm is to limit arbitration, it is known that the legal text cannot account for the multiple realities, whose protagonists will be subjects located in time and space, linked to the maximization of their gains in each case.

The cognitive and communicational device enlivened in the process will be built by constant human interactions, open to collaboration and foul play, depending on the players' tactical and strategic choices. Faced with success in each sub-game (stage of the procedural rite) the elected tactic can bring forth primitive pleasures of drive satisfaction, especially when playing through masks attributed to pre-defined places of inglorious struggles of good versus evil and vice versa. Many players will protect themselves by building a public avatar capable of mitigating, perhaps, the real impotence.

[28] WARAT, Luis Alberto. A Rua Grita Dionísio. Rio de Janeiro: Lumen Juris, 2011.

The description of the possibilities of normative meaning and of the behaviors indicates what the players *can* do, with or without respect to the rules, as well as what they *must* do from a democratic premise. It will be from the criteria of individual rewards that dominant/dominated strategies can be established. Overcoming the reductionist vision of real games as moments of dilettantism, with a combination of aesthetic, ethical and democratic dimensions, may imply new meanings for the criminal procedure in relation to effective procedural behavior.

The bias of self-fulfilling prophecy operates here: if you think the game is a joke, you will not take seriously what is articulated next, while you can understand that Game Theory assists in reading human interactions linked to maximizing individual gains and the new horizons that open up. The challenge posed is complex and depends on the capacity of intelligence, preparation and performance, mainly because the imponderable can appear just when the individual least expects it. Always!

The formal reading of the procedural device will depend on the various concepts adopted by real players, full of multiplicity. Therefore, it is not possible to previously establish the content of the various procedural institutes that may gain different paths during the interactional course. What matters is that there is interaction through the significant contradictory. Provided with multiple theoretical perspectives (i.e., crime theory: finalists, objective imputation, etc.), the professional player will be able to operate on the normative board and in the field of real interactions, and thus better understand and anticipate dominant/dominated tactics/strategies in each procedural context.

Each procedural game in its singularity constructs convergent/divergent meanings compared to the collective standards, described by the prevailing paradigm. The normative platform of the game suffers the human contingencies of the players, eager for the satisfaction of their rewards. The individual's understanding of the place and function of the criminal process alter the meaning of procedural play. The assumption of a place and function of guarantee of the collectivity, guarantee of the accused (individual) or both, as premise, modifies the understanding of procedural norms.

What is intended in the proposal is to promote conditions for reading the gameplay, within and outside the established rules, mainly in the context of ambivalences of meaning that can be established before the possible rhetorical manipulation of normative texts. We can suggest "how to generically do" a tactic and/or strategy, without being possible, however, to previously indicate adequate income in all cases. The construction of the criminal case theory in its uniqueness should be the first step. Only then will it be possible, in each specific context, to choose dominant/dominated tactics/strategies. In any case, aware of the design of the game, one can act more efficiently, given the concurrent reading between theory and practice, in order to indicate the pattern of that game. Structuring the tactics/strategies will be a constant challenge that does not end *a priori*, because it demands the continuous and dynamic work of strategic realignment, given the significant change, in time and space, of the ongoing processual interaction.

Aware of the multiple possibilities of assigning meaning to procedural and penal norms, as well as knowing the mind map of the characters with significant function in the singularized process, one can establish a shared vocabulary of meanings (not necessarily what one wishes, but what is possible). It is through the vocabulary and the meanings of the other procedural agents that one can, minimally, dialogue in a significant contradictory. The conceptual isolation of the institutes generates an unproductive clash of meanings in which the work of preliminary conviction may require inglorious and irrelevant effort. To dominate how the adversary and the judge think represents a communication gain. The argumentative territory of the procedural game must be shared, in order to avoid talking to a wall, without any impact on the cognitive capture of the rest of the interaction agents.

3. COGNITION, HEURISTICS AND BIASES

The vast majority of players (magistrates, lawyers, parties, etc.), although making repeated procedural decisions (theses, questions, procedural decisions, etc.), have never had any technical and adequate training on the decision-making mechanism. Knowledge was acquired through experience, always limited, within their universe of performance, by the examples they had during their professional career and academic training, without studying the cognitive, psychological[29], emotional, regulatory, biological and unaware mechanisms that can (potentially) appear in the decision-making moment. Hence it is necessary to understand minimum concepts arising from the procedural interaction that happens in an environment of uncertainty and information asymmetry, that is, always with less information than necessary for a perfect decision. Therefore, the decision will always be a bet on the best result, given the multiple factors involved in anticipating the consequences of the actions and effects of dominant/dominated tactics/strategies. Especially in the field of contemporary law in which multiplicity of meanings and ambiguity prevail.

How can one know if strategy (what is intended with the procedural game) is adequate with the tactic (action or intermediate procedural behavior), in the face of the rewards of the other players? How should one behave in an increasingly complex, multidimensional process, full of ambiguity and uncertainty? To what extent can one realize and expect rational or irrational behavior? What are the external clues for proper reading of the singular procedural game, that is, the game that is being played?

From these questions, it is intended to move from the introduction of the Game Theory to the process. Perhaps we can better situate ourselves in an environment of uncertainty, of (ir)rational choices that are increasingly present and that modify the possibility of reading the design of the procedural game. In any case, information management and behavior expectations gain an ally in the face of current cognitive difficulties. The course will be briefly carried out in two stages: (i) descriptive of the behavior of procedural players, and: (ii) prescriptive of how to

[29] WOJCIECHOWSKI, Paola Bianchi: MORAIS DA ROSA, Alexandre. Vieses da Justiça: como as heurísticas e vieses operam nas decisões penais e a atuação contraintuitiva. Florianópolis: EMais, 2019.

improve the way of facing the issues. There will be suggested ways of understanding the underlying processes of decision making in the procedural game.

The theoretical-practical concern is to establish tools capable of indicating how to make certain decisions in the process. What are the criteria to avoid foreseeable errors and also to choose dominant/dominated tactics/strategies, that is, how to evaluate the effects of procedural actions. In an increasingly flexible and uncertain process, in which the coordinates of action change in the face of real players and contexts (and their rewards), risking the design path of game theory may be more realistic, especially in the face of the errors of our limited cognitive ability[30]. Hence it is a different way of understanding the decision-making mechanism from multiple levels of approach, given that players are human subjects with limited rationality and strong emotional variable. Emotion and intuition are relegated by the silence of official discourse, although they operate at every moment of decision making. Cognitive fluctuations play with several limiting factors, although by the fact that one thinks, it is usually believed, with overconfidence[31] that dominates all the reasons and emotions of choices, as if it were possible to be omniscient of all the surrounding context. The effects of heuristics and biases are suffered.

So it will be necessary to understand a little of Cognitive Psychology due to our limitations. As we cannot - and do not even have the capacity, disposition and incentives - study, register, reflect and decide in every situation of the (legal) world of life, heuristics - mind shortcuts – are created, which can lead to biases - systematic errors[32] - of thinking. Heuristics are simplifying shortcuts: intuitive and immediate judgments, devoid of reflection, based on experience (personal or consulted), capable of promoting decisions based on assumptions, partial knowledge. Our working memory is finite, the time of sparse reflection and the tendency to reduce mind effort a human reward. This is because we process environmental information and evidence within human limitations and we need, in order to reduce effort, to create pre-ready decision mechanisms , since we are not always interested enough (there are not enough rewards) for us to pay attention

[30]MICHEL-KERJAN, Erwann; SLOVIC, Paul (Org.). A economia irracional: como tomar as decisões certas em tempos de incerteza. Rio de Janeiro: Elsevier, 2010, p. 5:. According to Michel-Kerjan, as human beings, we have intuitive and analytical thinking skills that work beautifully, most of the time, that help us to navigate through life and achieve our goals as individuals or as a group. But sometimes our faculties of rational thinking fail.

[31]STERNBERG, Robert J. Psicologia Cognitiva. Trad. Anna Maria Luche. São Paulo: Cengage Learning, 2012, p. 442. To Sternberg, regarding the overvaluation that a person makes of his/her own abilities, in general, people tend to overestimate the accuracy of their judgments. Why do people show overconfidence? One reason is that people may not realize how little they know. A second reason is that they can understand what they are assuming when they use the knowledge they possess. A third reason may be that they do not know that their information is based on unreliable sources. The reason we tend to manifest overconfidence in our judgments is not clear. A simple explanation is that we prefer not to think about the possibility of being wrong.

[32] WOJCIECHOWSKI, Paola Bianchi: MORAIS DA ROSA, Alexandre. Vieses da Justiça: como as heurísticas e vieses operam nas decisões penais e a atuação contraintuitiva. Florianópolis: Emodara/EMais, 2018 (no prelo nova edição ampliada, 2019); NUNES, Dierle; LUD, Natanael; PEDRON, Flávio Quinaud. Desconfiando da Imparcialidade dos Sujeitos Processuais: um estudo sobre os vieses cognitivos, a mitigação de seus efeitos e o debiasing. Salvador: JusPodivm, 2018; COSTA, Eduardo José da Fonseca. Levando a imparcialidade a sério: proposta de um modelo interseccional entre direito processual, economia e psicologia. Salvador: JusPodivm, 2018; Goulart, B. B. Análise Econômica da Litigância: entre o modelo da escolha racional e a economia comportamental (Master's thesis). Universidade Federal de Santa Catarina, Florianópolis, Santa Catarina, Brazil; and my book written with Gisele Tobler. The international bibliography is, in addition, abundant on the subject; Abiko, P. Y. (2018). Vieses da Justiça e Atuação Contraintuitiva. Retrieved on July 5, 2019 from https://canalcienciascriminais.com.br/vieses-justica/

(especially in repetitive cases or because of cognitive dissonance), generating, frequently, patterns of decision-making behavior. Heuristics decreases the mind workload we handle during the day[33]. It generates comfort, apparent coherence, but it can be a cognitive trap. In times of speed and efficiency in numbers, it seems to be fully operable.

This "facilitation" model is not restricted to players who may already have prior understandings of important themes and are not available for new arguments, as it happens, for example, with the summation logic of comfort or cognitive dissonance. If the subject is already decided, many do not accept the summation entry by reflection, but by mere adhesion. There is no reflective path when the destination point is already given. Hence the creation of heuristics: "mantras of meaning", adages, common places, informal, intuitive and speculative tactics that can generate patterns of correctness and also of error[34]. In short, in the case of Law, they are mind shortcuts by which the complex decision-making process is facilitated, with the inherent risks. The contribution of Cognitive Psychology indicates various nomenclatures of heuristics and biases, which will be addressed in the most incident ones in the field of procedural game.

It should be noted that the use of the term 'unconscious' will not be exclusively psychoanalytic, which will broaden understanding, since, according to Callegaro (2011, p. 16), we find literature divided into two basic aspects: on the one hand, psychoanalysts and humanists who use the term unconscious referring to Freud's concepts; on the other hand, scientists who avoid the term by their connotations, looking for other expressions such as implicit processes *(memory neuroscience),* subliminal *(social psychology) or* automatic *(cognitive psychology).*[35]

As "working memory" is limited, the availability (evocation facility) of our personal experiences may entail shortcuts to the decision. The point is that with it, the logic of reasoning[36]

[33] MACKAAY, Ejan; ROUSSEAU, Stéphane. Análise Econômica do Direito. Trad. Rachel Sztajn. São Paulo: Atlas, 2015, p. 35: point out that psychological research shows that humans judge complex situations imperfectly. Here the spirit, once again, tends to simplify them by means of heuristics to bring them to the level where they can be approached with the ordinary mind faculties that we have at present. According to the authors, Tversky and Kahneman propose, under the name of prospect theory, to represent the decision in two stages. The first is to find a frame for the problem and frame it (framing and editing); the second step is evaluation. For what we are interested in, it is the first stage that intervenes the rules: the representation obtained is a function of the way in which the problem is presented to the decision maker rather than by the norms, habits and care adopted. The representation determines the aspects of the problem to be considered.

[34] STERNBERG, Robert J. Psicologia Cognitiva. Trad. Anna Maria Luche. São Paulo: Cengage Learning, 2012, p. 25: To Sternberg, one can perceive, learn, remember, reason and solve problems with great precision. This occurs even with a lot of stimuli. Any stimulus can divert the individual from the proper processing of information. However, the same processes that lead us to perceive, remember, and reason accurately in most situations can also lead us to error. Our memories and reasoning, for example, are susceptible to certain well-identified systematic errors. For example, as one realizes how much he/she has learned about heuristic availability, the tendency is to overvalue the information that is already available, and this occurs even when the information is not entirely relevant to the problem in question.

[35] CALLEGARO, Marco Montarroyos. O novo inconsciente. Porto Alegre: Artmed, 2011, p. 16.

[36] MACKAAY, Ejan; ROUSSEAU, Stéphane. Análise Econômica do Direito. Trad. Rachel Sztajn. São Paulo: Atlas, 2015, p. 35: affirm that we do not properly evaluate small probabilities. They are ignored. It would not be justified to take them more seriously than the 'objective' risk. The overestimation of risk appears especially when we realize a living picture of danger. Not being able to judge the odds directly, the human spirit simplifies the problem by appealing to the availability heuristic, which will make us decide according to the example that is still fresh in the mind (spirit). When a plane crashes, some people stop booking flights in which they should board during the days right after the crash. We are also, and often, prisoners of the gambler's run. If during the month of July it rains for three days, but it has rained five days since the beginning of the month (July), we believe that the rest of the month will necessarily be of good weather.

is often manipulated. The availability heuristic can mean the disregarding of the peculiarities of the case, associating a previous and recent decision with a similar hypothesis, with the risk of distorted information, either by the press, by stereotypes, by personal experiences (including unconscious ones) that occur at the moment of the decision[37]. It can operate the cognitive dissonance by the availability of recent decision-making, in the pretense of maintaining coherence and avoidance of dissonance[38], especially when using the fallacy of illusory correlation.[39]Therefore, the order of depositions, the primacy or the availability of recent information (evidence) should be evaluated, since we remember more easily what is 'fresh' in the memory. In the order of witnesses/informants is it worth starting with the best or saving the best for the grand finale? [40]

Therefore, the importance of "Case Theory", given the need to emphasize the uniqueness of the hypothesis in judgment, of its characters, under penalty of, often, before the narrative of the hypothesis, not giving importance to the contradictory evidence, given the association to previous and available cases in memory[41]. The same holds true for the hypothesis of errors. Recent experience in professional activity, the last book read, the lecture attended or even a pleasant/unpleasant memory[42]. The degree of ease with which similar situations are remembered,

[37] STERNBERG, Robert J. Psicologia Cognitiva. Trad. Anna Maria Luche. São Paulo: Cengage Learning, 2012, p. 440: According to Sternberg, examples of distorted coverage could be the sensationalist tabloid coverage of the press, extensive advertising, the recent character of an unusual occurrence or personal bias. Generally, we make decisions in which the most common cases are the most relevant and valuable. In such cases, the availability heuristic often represents a convenient shortcut with few burdens. However, when particular cases are best remembered for distortions (for example, their view of their own behavior compared to that of other people), the availability heuristic can lead to decisions that are unfortunate.

[38] FESTINGER, Leon. Teoria da dissonância cognitiva. Trad. Eduardo Almeida. Rio de Janeiro: Zahar, 1975; SCHÜNEMANN, Bernd. Estudos de direito penal, direito processual penal e filosofia do direito. São Paulo: Marcial Pons, 2013; RODRIGUES, Aroldo; ASSMAR, Eveline Maria Leal; JABLONSKI, Bernardo. Psicologia social. Petrópolis: Vozes, 2010; GOLDSTEIN, Jeffrey H. Psicologia social. Trad. José Luiz Meurer. Rio de Janeiro: Guanabara Dois, 1983; ÁLVARO, José Luis; GARRIDO, Alicia. Psicologia social: perspectivas psicológicas e sociológicas. Trad. Miguel Cabrera Fernandes. São Paulo: McGraw-Hill, 2006; BERKOWITZ, Leonard. Psicologia social. Trad. Magali Rigaud Pantoja Bastos. Rio de Janeiro: Interamericana, 1980; LIMA, Luísa Pedroso de. Atitudes: estrutura e mudança. In: VALA, Jorge; MONTEIRO, Maria Benedicta (coord.). Psicologia social. Lisboa: Fundação Calouste Gulbenkian, 2004; RITTER, Ruiz. Imparcialidade no processo penal: reflexões a partir da teoria da dissonância cognitiva. Florianópolis: Empório do Direito, 2017.

[39] MATLIN, Margaret W. Psicologia Cognitiva. Trad. Stella Machado. Rio de Janeiro: LTC, 2004, p. 276: To Matlin, a correlation is a statistical relationship between two variables, even if there is no real evidence of that relationship. Thus, there is an illusory correlation when people believe that two variables are statistically related, even if there is no real evidence of this relationship. According to several studies, we often believe that a certain group of people tend to have certain types of characteristics, although an exact classification shows that the relationship is not statistically significant. Think of some examples of stereotypes that emerge from illusory correlations. These may or may not have a basis in fact; may even have much less basis than is commonly believed. For instance the following illusionary correlations: women are not good at math, blond women are not very intelligent, male and female homosexuals have psychological problems, and so on. According to an important current approach, our stereotypes are influenced by cognitive processes, such as availability.

[40] WALTON, Douglas N. Lógica Informal. Trad. Ana Lúcia R. Franco e Carlos A. L. Salum. São Paulo: Martins Fontes, 2012, p. 81-82: According to Walton, every argument presupposes a context of dialogue in which there is a question, or perhaps several questions, under discussion. To the author, in practice, one of the major problems in assessing a realistic argument is that the arguers may not even be clear about what they are discussing.

[41] STERNBERG, Robert J. Psicologia Cognitiva. Trad. Anna Maria Luche. São Paulo: Cengage Learning, 2012, p. 440: According to Sternberg, one of the factors that lead to greater availability of an event is, actually, the higher frequency of the event.

[42] MATLIN, Margaret W. Psicologia Cognitiva. Trad. Stella Machado. Rio de Janeiro: LTC, 2004, p. 274-275: Matlin points out that a paper in the New England Journal of Medicine highlights how doctors' decisions may be influenced by the recency effect. According to the author, the paper reports the case of a medical doctor who was reluctant to recommend a particular clinical procedure because he had previously seen one of his patients, who had undergone such a procedure, develop a serious neurological disorder. As the authors of the paper said that remembering a patient who has suffered a complication is an example of a heuristic of availability. Matlin (2004) states that other research suggests implications for clinical psychology. As

of their relevant points, in detail, can make a difference. What is more available becomes easier and there is a tendency to overestimate the standards[43]. Availability can operate not only in relation to the process, but also within the context the game is played.

CONCLUSIONS

The complexity of the dynamic and multifactor mode in which the decisions in democracy can be made requires a comprehensive effort able to outline the scenarios with its players, rules, rewards and tactics/strategies able to establish realistically "how" the structure of human interaction mediated by the process, in which Game Theory can be an ally of meaning, is established.

In addition to the formal reading indicated by the Game Theory, the cognitive environment is opened, with traps, biases and heuristics, whose domain is relevant for a realistic accommodation of the procedural game environment. Although not all the possibilities of heuristics and biases have been explored[44], stressing the incidence served as evidence of the complexity in which decision theories need to dialogue. What really matters is to reveal the possible incidence of human factors in the understanding of language games[45].

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reported by Matlin, MacLeod and Campbell (1992) found that when people were encouraged to remember pleasant events in the past, they evaluated those events as more probable to happen in their future. On the contrary, when they were encouraged to remember unpleasant events, they considered them less probable.

[43] MARINHO, Raul. Prática na Teoria: aplicações da teoria dos jogos e da evolução aos negócios. São Paulo: Saraiva, 2011, p. 268: As stated by Marinho, the disproportional impact of recent events on trials is so powerful that even individuals who are aware of this fact have difficulty in avoiding it. It takes a lot of mind effort not to make the wrong decision because of the influences of recent events.

[44] NUNES, Dierle; LUD, Natanael; PEDRON, Flávio Quinaud. Desconfiando da Imparcialidade dos Sujeitos Processuais: um estudo sobre os vieses cognitivos, a mitigação de seus efeitos e o debiasing. Salvador: JusPodivm, 2018, p. 65-67; COSTA, Eduardo José da Fonseca. Levando a imparcialidade a sério: proposta de um modelo interseccional entre direito processual, economia e psicologia. Salvador: JusPodivm, 2018, p. 60-70.

[45] WITTGENSTEIN. Ludwig. Investigações filosóficas. Trad. José Carlos Bruni. São Paulo: Nova Cultural, 1999, p. 25-206.

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